TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 128

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

THE STATE OF NEW MEXICO.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 11, 1919.

(27167)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 412.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

THE STATE OF NEW MEXICO.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, et al., appellants,
vs.
STATE OF NEW MEXICO. } No. 3221.

Supreme Court of the District of Columbia.

STATE OF NEW MEXICO, PLAINTIFF,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of General Land Office, defendants. | Equity. No. 35624.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill.

Filed December 21, 1917.

In the Supreme Court of the District of Columbia.

STATE OF NEW MEXICO, PLAINTIFF,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, defendants. | Equity. No. 35624.

To the Supreme Court of the District of Columbia, holding an Equity Court:

The State of New Mexico, plaintiff, by its attorney general, Harry L. Patton, and its assistant attorney general, Milton J.
2 Helmick, brings this its bill of complaint, on its own behalf, against Franklin K. Lane, a citizen of the State of California, residing in the District of Columbia, and Clay Tallman, a citizen of the State of Nevada, and residing in the District aforesaid, in respect of the matters and things hereinafter set forth. The State says:

I. That the State of New Mexico is one of the States of the American Union and is a sovereign State of the United States. That at the time of the filing of this bill the defendant, Franklin K. Lane, was, and he still is, the Secretary of the Interior Department of the United States, and, as such, has charge of the administration of the

laws of the United States relating to the public lands, and the administration of all land grants made by Congress including any portion of said public lands; and that the defendant, Clay Tallman, was, and he still is, Commissioner of the General Land Office of the United States, the latter being one of the branches of said Department of the Interior, having immediate charge of the matter of the administration of the public lands of the United States, and of land grants made by Congress, said Commissioner acting therein under the direction, supervision and approval of the Secretary of the Interior; and that each said defendant is sued in his official capacity as such Secretary of the Interior and Commissioner of the General Land Office, respectively, as hereinafter set forth.

II. That, by act of Congress, approved June 21, 1898 (30 Stat. 484, 5), entitled "An act to make certain grants of land to the Territory of New Mexico, and for other purposes," a grant of land was made to the Territory of New Mexico, said grant being thus:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and where such sections, or any parts thereof, are mineral or have been sold or otherwise disposed of by or under the authority of any act of Congress, other nonmineral lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said Territory for the support of common schools, such indemnity lands to be selected within said Territory in such manner as is hereinafter provided:

"Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants of this act; but such reservations shall be subject to the indemnity provisions of this act."

And by sections seven, eight, and nine of said act it was thus provided:

"Sec. 7. That this act is intended only as a partial grant of the lands to which said Territory may be entitled upon its admission into the Union as a State, reserving the question as to the total amount of lands to be granted to said Territory until the admission of said Territory as a State shall be determined by Congress.

"Sec. 8. That all grants of land made in quantity or as indemnity by this act shall be selected by the governor of the Territory of New Mexico, the surveyor general of the Territory of New Mexico, and the solicitor general of said Territory, acting as a commission, under the direction of the secretary of the interior, from the unappropriated public lands of the United States within the limits of the said Territory of New Mexico.

"Sec. 9. That said commission shall proceed upon the passage of this act, to select said lands, for each purpose as hereinbefore designated, in legal subdivisions, of not less than one-quarter section, and shall report to the secretary of the interior such selections, designating in such report the purpose for which such bodies of land as selected are to be respectively used as provided above in this act."

III. That said Territory of New Mexico duly accepted the grant so made to it in said act and evidenced its acceptance thereof by an enactment of its legislative assembly, approved March 16, 1899, (Laws of New Mexico, 1899, at page 156 et seq.) entitled "An act establishing a board of public lands, asigning their duties, and for leasing and managing public lands and funds," certain of the provisions of said enactment being as follows:

"Section 1. That the governor, solicitor general and commissioner of public lands shall be and hereby are constituted a board of public lands for the leasing, sale and general management and control of all public lands or public funds that have been granted or shall hereafter be granted for any purpose to the Territory of New Mexico, or to the State when it shall become a State and for the investment of any public funds as the best interests of the Territory, or State when it shall become a State shall require, not inconsistent with the provisions of the acts of the Congress of the United States (or) this act."

* * * * * * *

"Section 10. All lands granted to the Territory by Congress or that shall hereafter be granted to the Territory of New Mexico or the State of New Mexico by an act of Congress, appcoved June 21, 1898, entitled 'An act to make certain grants of land to the Territory of New Mexico and for other purposes,' or by any other act which may hereafter be passed by Congress for any of the purposes or similar purposes as those mentioned in the act of Congress before referred to, are hereby withdrawn from market, and the sale thereof, is hereby prohibited except as hereinafter provided."

* * * * * * *

"Section 28. All funds belonging to the Territory for any of the purposes for which the donations were made by the said act of
4 Congress herein referred to or any similar act of Congress which may hereafter be enacted for the benefit of the Territory or the State of New Mexico, shall be deemed trust funds and held by the Territory, the interest and income whereof are only to be used except as hereinafter provided and the Territory shall supply all loss of said funds that may occur, so that the same shall remain entire and undiminished," et cet.

* * * * * * *

"Section 31. The said board hereby created is hereby authorized and empowered in order to immediately raise the necessary funds to secure the lands already donated to the Territory by the act of Congress herein mentioned, it being impossible for the Territory to immediately provide the same owing to its financial condition, to contract for a sale and to sell and dispose of a sufficient quantity of any of the lands authorized by the said act of Congress before men-

tioned to be sold and disposed of, for the best price obtainable and for a sum not less than three dollars per acre, sufficient to realize the amount of eighteen thousand dollars, out of which amount when so realized the fees of the offices of the various land offices where any of the lands so donated by said act of Congress may be situate, shall be paid," et cet.

IV. That, by act of Congress, approved March 16, 1908, (35 Stat. 44) entitled "An act to make the provisions of an act of Congress approved February twenty-eighth, eighteen hundred and ninety-one (Twenty-sixth Statutes, page seven hundred and ninety-six), applicable to the Territory of New Mexico," it was provided:

"That all the provisions of an act of Congress approved February twenty-eighth, eighteen hundred and ninety-one, entitled 'An act to amend sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United States providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes,' be, and the same are hereby, made applicable to the Territory of New Mexico, and the grant of school lands to said Territory, and indemnity therefor, shall be administered and adjusted in accordance with the provisions of said act, anything in the act of Congress approved June twenty-first, eighteen hundred and ninety-eight, making certain grants of land to the Territory of New Mexico, and for other purposes, to the contrary notwithstanding."

That said sections 2275 and 2276 of the Revised Statutes of the United States, as amended by the act of February 28, 1891, supra, read as follows:

"Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption of homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the secretary of the interior, without awaiting the extension of the public surveys,

to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: Provided, however, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain; and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

Sec. 2276. "That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land: Pro-
6 vided, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships."

V. That said Territory of New Mexico duly accepted the grant so made to it in the act of March 16, 1908, supra, and evidenced its acceptance thereof by an enactment of its Legislative Assembly, approved March 18, 1909 (Laws of New Mexico, 1909, at page 286 et seq.) entitled "An act to amend 'an act to provide for the leasing, sale, management and control of all lands now owned or hereafter acquired by the Territory of New Mexico; to create a territorial public land office; a commissioner thereof, and to prescribe the duties of such officer; to provide for the care, custody, disposition and investment of moneys derived from all territorial lands by leasing, sale or otherwise; and for other purposes, approved March 21, 1907,' and for other purposes," certain of the provisions of said enactment being as follows:

"Section 1. That section 3 of chapter 104 of the Session Laws of 1907 be and the same is hereby amended so as to read as follows:

"'Section 3. The commissioner of public lands shall be provided with an official seal, and it shall be his duty * * * to deed by

quitclaim or otherwise to the United States covering any or all claim that the Territory of New Mexico may have in and to lands within any private land grant or reservation made in pursuance of authority of any act of Congress, for the purpose of selecting indemnity lands therefor, or lands in lieu thereof.'"

VI. That by act of Congress approved June 20, 1910, (36 Stat. 557, 561, 562, 563, 565) entitled "An act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union *or* an equal footing with the original States; and to enable the people of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States," a grant of land was made to the State of New Mexico, said grant being thus:

"Sec. 6. That in addition to sections sixteen and thirty-six, heretofore granted to the Territory of New Mexico, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of Congress, or are waiting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same ex-
7 tent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: * * * And provided further, That the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situate within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of all the national forests within said State, the area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated."

* * * * * * *

"Sec. 10. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

"Sec. 11. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and non-mineral public lands of the United States within the limits of said State, by a commission composed of the governor, surveyor-general, or other officer exercising the functions of a surveyor-general, and the attorney-general of the said State."

VII. That said State of New Mexico duly accepted the grant so made to it by the act of Congress of June 20, 1910, supra, and evidenced its acceptance thereof by provisions in its State constitution which reads as follows:

"The permanent school fund of the State shall consist of the proceeds of sales of sections two, sixteen, thirty-two, and thirty-six in each township of the State, or the lands selected in lieu thereof," et cet. (Section 2 of Article XII of the constitution of the State of New Mexico.)

"All lands granted under the provisions of the act of Congress entitled 'An act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on
8 an equal footing with the original States' for the purposes of said several institutions are hereby accepted and confirmed to said institutions, and shall be exclusively used for the purposes for which they were granted," et cet. (Section 12 of Article XII of the constitution of the State of New Mexico.)

That acceptance by the State of New Mexico of the said grant is further evidenced by sections nine and ten of Article XXI of the constitution of the State of New Mexico (which article is entitled "Compact with the United States"), which sections provide:

Section 9. "This State and its people consent to all and singular the provisions of the said act of Congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act granted or confirmed to this State, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided."

Section 10. "This ordinance is irrevocable without the consent of the United States and the people of this State, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of Congress."

VIII. That the final act obligating the United States to respect, observe, and abide all the terms and conditions of the grant made to the State of New Mexico by the said act of Congress of June 20, 1910, supra, and which had been accepted by said State as aforesaid, was performed by and under the proclamation of the President of the United States issued January 6, 1912 (37 Stat. 1723), in which proclamation it is recited that "the conditions imposed by the said act of Congress approved on the twentieth day of June, one thousand nine hundred and ten, and by the said joint resolution of Congress have been fully complied with" and proclaimed "that the fundamental conditions imposed by Congress on the State of New Mexico to entitle that State to admission have been ratified and accepted, and that the admission of the State into the Union on an equal footing with the other States is now complete."

That for the purpose of administering under, conserving, and enjoying the grant of land made to the State of New Mexico, as aforesaid, the legislature of the said State enacted a statute, approved June 14, 1912 (Laws of New Mexico, 1912, at page 174, et seq.), and entitled "An act to provide for the creation, organization, and maintenance of the State land office," et cet. That in said act it is provided, among other things, as follows:

"Section 1. That a State land office is hereby created, the executive officer of which shall be the commissioner of public lands," et cet.

"Section 2. * * * Said commissioner shall have power * * * to deed by quitclaim or otherwise to the United States any or all claims that the State may have in and to lands within any private land grant or reservation made or confirmed in
9 pursuance of authority of Congress, or to such of its lands as may be needed by the United States or for reclamation of power sites for the purpose of selecting indemnity lands therefor," et cet.

IX. That the granting act of June 20, 1910, supra, the provisions of the Constitution of the State of New Mexico, the enactment by the legislature of said State and the proclamation admitting said State into the Union, all of which are referred to hereinbefore, constituted a contract between the United States, and said State of New Mexico, the indemnity and lieu grant contained in said act of June 20, 1910, by the reference therein to amended sections 2275 and 2276, Revised Statutes, supra, being as much a part of said contract itself as the grant therein and thereby made of sections 2, 16, 32 and 36 of every township; and said granting act and contract conferred and was intended to confer upon the grantee, the State of New Mexico, a substantial right to the amount of lands within the description of "surveyed, unreserved, unappropriated, and non-mineral public lands of the United States," as provided in section 11 of said act of June 20, 1910, which might be necessary to fill and satisfy losses to the grant of specific sections 2, 16, 32 and 36; and while the indemnity and lieu lands so granted by the act of June 20, 1910, are required to be

selected under the direction of the Secretary of the Interior, the authority of the Secretary is limited to the exactions found in said granting act, namely, that at the date of the indemnity or lieu selection of any particular tract or tracts of land, tendered to and certified by the local land officers, there existed no adverse claim to or a reservation of the land selected, that the land is not known to contain mineral of value, and that good and valid base is offered for the indemnity or lieu selection; no discretion or authority being vested in said Secretary by the provisions of said act of June 20, 1910, supra, either to lessen, impair or defeat said indemnity and lieu grant, either in whole or in part, and no discretion or authority being vested in either the Secretary of Agriculture or the President of the United States by the provisions of said act of June 20, 1910, supra, either to lessen, impair or defeat said indemnity and lieu grant, either in whole or in part, by eliminating the base lands which support the indemnity or lieu selection from the public reservation in which such base lands were located at the time of perfecting of the selection.

X. That the State of New Mexico has always fully complied with each, every and all of the terms, conditions, stipulations and requirements of said land grant and has by acts of its legislature and its executive and administrative officers provided for and effected public education within said State in accordance with every intendment of such land grant and has also provided for, constructed and maintained the public institutions which were to be, and are, aided by such land grant, all of which has necessarily been beneficial to the United States as well as to the State of New Mexico. That the State of New Mexico has always conformed to and abided those regulations and those rules of practice in and before the General Land Office and the Department of the Interior of the United States (35 L. D., 537; 38 ibid. 611; 39 ibid, 39), which control and govern in the matter of selections of public lands of the United States under grants to the States for educational and other purposes.

XI. That the land grant aforesaid to the State of New Mexico for the support of common schools remains unadjusted in that the said State has neither acquired the legal title to all of the lands granted, to wit, sections two, sixteen, thirty-two and thirty-six of every township within said State nor acquired legal title to all the lands which it has, in the terms of said grant, a right to select in indemnity for or in lieu of said sections. That the fact that such grant remains unadjusted and unsatisfied has not been due to any neglect, failure or default upon the part of said State, but is attributable, in the main, to the fact that a large portion of the area of the State of New Mexico remains unsurveyed, and to the further fact that many of said sections are within public reservations established under authority of the United States. That any condition whatever which is responsible for inability on the part of the State of New Mexico promptly to acquire title to the sections granted to it for common school pur-

poses or any incident in the prosecution before the Department of the Interior of the said State's selections of indemnity or lieu lands for said sections which results either in an unlawful denial by said Department of such selections or in unreasonable delay in the approval thereof, is seriously detrimental to the highest public interests of the said State and inflicts upon said State an irreparable injury and financial loss.

XII. That to insure as far as possible against any impairment of the value of the said land grant to the State of New Mexico by enabling said State to protect itself against losses of sections 2, 16, 32, and 36 in place, as well as against losses of lands subject to appropriation by it under the grant to it of indemnity and lieu lands, it was provided by section eleven of the act of June 20, 1910, supra, that—

* * * "after its admission into the Union said State may procure public lands of the United States within its boundaries to be surveyed with a view to satisfying any public land-grants made to said State in the same manner prescribed for the procurement of such surveys by Washington, Idaho, and other States, by the act of Congress approved August eighteenth, eighteen hundred and ninety-four (Twenty-eight Statutes at Large, page three hundred and ninety-four), and the provisions of said act, in so far as they relate to such surveys and the preference right of selection, are hereby extended to the said State of New Mexico."

That said act of August 18, 1894, as thus extended to New Mexico, provides:

"* * * That is shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and
11 Wyoming to apply to the commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the commissioner of the General Land Office shall proceed to immediately notify the surveyor general of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the surveyor general shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State,

within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: And provided further, That the commissioner of the General Land Office shall give notice immediately, of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided: And provided further, That the governors of the several States herein named are authorized to advance money from time to time for the survey of the townships withdrawn at such United States depository as may be designated by the commissioner of the General Land Office, and the money so advanced shall be reimbursable. The foregoing provisions shall be applicable to Utah when admitted as a State into the Union and a governor is duly inaugurated and acting. * * *"

XIII. That invoking and availing of the provisions of said act of August 18, 1894, the State of New Mexico made application to the commissioner of the General Land Office for a withdrawal and survey thereunder and on August 24, 1914, there was duly with-
12 drawn and reserved under said act a large area of then unsurveyed land in said State. That a part of the area so withdrawn and reserved was found, after survey, to be within the boundaries of township 23 south, range 38 east of the New Mexico principal meridian. That the approved plat of survey of said township was filed in the United States land office at Roswell, New Mexico, on March 9, 1915; and the entire area of said township is designated as being of the character of land enterable under the enlarged homestead act of February 19, 1909 (35) Stat. 639).

XIV. That the approved plat of the survey of township 19 south, range 14 east, New Mexico principal meridian, in the State of New Mexico, was filed in the appropriate local United States land office in the then Territory of New Mexico on June 24, 1885. That the title to sections numbered 16 and 36 in said township passed from the United States to said Territory on June 21, 1898, by operation of the act of Congress of that date, supra, which act made a grant of sections 16 and 36 in every township to said Territory. (Vide Tillian et al. vs. Keepers, 44 L. E., 460.)

That on December 20, 1906, the Secretary of the Interior withdrew all of said township 19 south, range 14 east for the then proposed Sacramento National Forest and by Executive proclamation of April 24, 1907, the entire township was included in the then, and

thereby established Sacramento National Forest. That by Executive proclamation of March 2, 1909, the name of the forest was changed to Alamo National Forest and by Executive proclamation of October 20, 1910, certain lands, but other than those pertinent to this cause, were excluded from, and others added to, said forest. That by Executive order of February 17, 1912, certain lands, but other than those pertinent to this cause, were excluded from the said forest. That by Executive order of March 30, 1915, certain lands, but other than those pertinent in this cause, were withdrawn with view to determining the advisability of their inclusion in the said forest and by Executive proclamation of April 3, 1916, section 36 of said township 19 south, range 14 east, and other lands, were excluded from said forest.

XV. That the State of New Mexico is limited in its selection of indemnity and lieu lands to such thereof as have been surveyed thus preventing selection thereof until after the official plat of the survey thereof shall have been filed in the local land office of the district wherein the lands are situate, when it is required to make formal presentation of its claim at such local land office through selection. That in due exercise of its "exclusive right of selection" for sixty days from the date, to wit, March 9, 1915, of the filing of the approved plat of survey of said township 23 south, range 38 east, N. M. P. M. in the United States land office at Roswell, New Mexico, which "exclusive right" had been conferred by the provision in the act of June 20, 1910, supra, which extended the benefits of the act of August 18, 1894, supra, to the State of New Mexico, the said State,

13 through and by the joint action of its governor, its attorney general and its commissioner of public lands filed in the said United States land office a selection (known as a State lieu selection 031,065, Roswell series) of the W. ½ of section 29 of said township 23 south, range 38 east, and other lands, in lieu of the N. ½ of section 36 of said township 19 south, range 14 east, and other lands. That at the time of filing of such selection the said N. ½ of section 36 of said township was then situate within the said Alamo National Forest and was therefore good, sufficient, and valid base for such lieu selection which was made and filed under the acts of June 21, 1898, supra, June 20, 1910, supra, sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891, supra, and supplementary and amendatory acts.

That such lieu selection was supported by a non-mineral, non-saline and non-occupancy affidavit with respect to the said selected land, and was accompanied with a deed by quit-claim executed by the State land commisisoner of the State of New Mexico in accordance with authority given that officer by the act of the Legislature of the State of New Mexico of June 14, 1912, supra, conveying to the United States all the right, title, claim, interest, and estate of said State in and to the said N. ½ of section 36 of township 19 south, range 14 east, and was accompanied also with a certificate by the clerk of the county of Otero, New Mexico, to the effect that the base or school

section land to which the said State had theretofore acquired title, had not been conveyed or encumbered by it, all of which proof in support of the validity and sufficiency of such selection was adduced at considerable expense to said State.

That such selection was also accompanied with the fees collectible by law, and otherwise met, in every requirement, the rules and regulations of the Department of the Interior in respect of the making and filing of selections of lieu lands by the several land grant aided States of the Union. That acting on such selection, the register of the Roswell office designated the Lovington Leader, a newspaper published at Lovington, New Mexico, as the medium of publication of notice of the selection, and notice thereof was published accordingly, and for five consecutive weeks, commencing with the issue of that paper of May 28, 1915, and ending with the issue of June 25, 1915, at the expense of the State of New Mexico. That notice of such selection was posted in the office of the register and receiver during the same period, and at expiration of the period of notice the register certified that no protests or objections of any character whatever had been made to the selection, which bears the following certificate over the signatures of the register and receiver:

"We certify that the foregoing list No. 5402 of indemnity school land selections, containing 640 acres, was filed in this office March 9, 1915, accompanied with legal fees amounting to $4.00; that there is not of record in this office any adverse, filing, entry or claim to the land selected by the State of New Mexico, and that the filing of said list is this day allowed and approved."

14 That the foregoing certificate is one affirming the sufficiency and validity of the base lands conveyed to the United States in support of and in consideration for the lands selected in lieu thereof and is one also affirming the legal availability of the lieu lands so selected.

XVI. And the State of New Mexico further avers that in and by its said lieu selection it duly executed a perfect deed of conveyance to the United States of all the right, title, claim, interest, and estate of the State of New Mexico in and to the lands assigned as the base for such selection; that delivery of such conveyance was made by the State to the register and receiver at Roswell, New Mexico, as the duly authorized and only agents of the United States competent to receive such conveyance; that said register and receiver formally received such conveyance on behalf of the United States when they executed the certificate aforesaid.

That in accordance with the rules, regulations, and practice of the Department of the Interior, the said register and receiver duly transmitted said conveyance and said certified lieu selection to the Commissioner of the General Land Office for appropriate consideration and ultimate acceptance by the Secretary of the Interior of such conveyance and the approval by said Secretary to the State of New Mexico of the land it had selected as the consideration for the lands it had reconveyed to the United States. That on April 13, 1915,

due and full notice of such selection was received in the General Land Office at Washington, D. C., from said register and receiver, That on August 23, 1915, there was received in said General Land Office proof of the posting and publication of notice of said lieu selection and thereupon, if not before, said selection was rendered complete and perfect. That no question has ever been raised either in or out of the Department of the Interior as to the sufficiency of the compliance made by the State of New Mexico with the terms, conditions, and stipulations of the land grant to said State and with the regulations of the Department of the Interior in respect to said selection. That the acts and decisions of the Land Department on said selection concede that it was a selection perfect in every detail and unassailable on any ground or for any reason from the date of the making thereof and for nearly a year thereafter.

XVII. That while the certain lieu selection aforesaid was so certified by the said register and receiver and, thereupon, forwarded to the Commissioner of the General Land Office for appropriate action and disposition, as above, no action was had thereon when, on April 3, 1916, as aforesaid, the land assigned as the base for such selection and described in the said deed of conveyance by the State of New Mexico to the United States was eliminated from the Alamo Forest by an Executive proclamation of that date, said proclamation having been expressly executed and issued under authority of section 24 of the act of Congress of March 3, 1891 (26 Stat. 1095, 1103) and the provisions of the act of Congress of June 4, 1897 (30 Stat.
15 11, at 34 & 36), which relate exclusively to the establishment, disestablishment, management, control, and administration of national forests and in nowise to the land grant to the State of New Mexico. That said provisions of law are in words following, to wit:

"That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth whether of commercial value or not, as public reservations, and the President shall by public proclamation, declare the establishment of such reservations and the limits thereof." (Section 24, act of March 3, 1891, supra.)

"That, to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests." (Act of June 4, 1897, 30 Stat., 11 at 34.)

"The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve." (Act of June 4, 1897, 30 Stat., 11 at 36.)

XVIII. And the State of New Mexico shows that, thereafter, and on May 16, 1916, the defendant, Commissioner of the General Land Office, by his office letter, held for rejection and cancellation the State's lieu selection aforesaid, upon the ground, and upon that ground only, that the lands which the State had offered as a base for such selection and had conveyed to the United States had been eliminated or excluded from the Alamo National Forest by and under said Executive proclamation of April 3, 1916; (the elimination and exclusion, however, having been made long subsequent to the perfecting of the lieu selection by the State, as above shown).

That the State duly appealed from the decision of the defendant, Commissioner of the General Land Office, to the defendant, Secretary of the Interior; assigning as error, the following:

In holding the base of such selection bad and the State's conveyance of the base land to the United States unacceptable because of the Executive proclamation of April 3, 1916.

Error in holding that the State's right to convey the base land, which was secured to it by a solemn contract between it and the Government, and where the State has long since performed its part of the contract and fully earned its right to convey the base land, can now be impaired or defeated by the President in and under a subsequent Executive proclamation excluding the base land from the Alamo National Forest.

Error in holding that the President by excluding the base land from such forest, or otherwise, however, can deprive the State grantee of rights under its land grant, either in whole or in part.

16 But the State says that said Secretary, by his decision, dated October 14, 1916, affirmed the said decision of the commissioner his decision in respect of the question raised upon said appeal being thus—

"The base lands in question are certain sections 2, 16 and 36, which were within a national forest, but have recently been eliminated therefrom and remain a part of the grant for school purposes. The State's selection not having been approved prior to such elimination, cannot now be allowed."

XIX. That the State, thereupon, and within the time therefor limited by the regulations and rules of practice of the Department of the Interior, filed motion for rehearing of the certain departmental decision aforesaid; but the same was thereafter, on the 23rd day of November, 1916, overruled and denied by the defendant, Secretary of the Interior, who, after citing in support of his denial of such motion a decision rendered by said defendant, Secretary of the Interior, on October 7, 1915, in State of California et al. (44 L. D., 468), said that it was therein "held that no right was acquired by the selection prior to approval such as would prevent 'a change in the status of either the selected land or the proffered base.'"

That the State, thereupon, filed a petition in the Department of the Interior praying for the exercise of the supervisory authority of

the defendant, Secretary of the Interior, to sustain the said selection by the State as a sufficient and perfect selection made by said State in the legitimate enjoyment of the grant of lands made to it by Congress; but such petition was thereafter, on the 18th day of October, 1917, denied by the defendant, Secretary of the Interior, and the record in said selection returned to the defendant, Commissioner of the General Land Office, for the purpose to make final the decision adverse to the State of New Mexico.

That in respect of the question presented and discussed in said petition for exercise of supervisory authority the decision of the defendant, the Secretary of the Interior, of October 18, 1917, announced the following ruling and conclusion, to wit:

"The department therefore concludes that the State took title to the base lands tendered in support of the selection under its grant, that title thereto was at all times thereafter, prior and subsequent to restoration of said lands from the forest reservation, and is now, in the State of New Mexico, and the very condition upon which the right of the State to offer said lands in exchange for others is predicated having been removed by elimination of the base lands from the forest reserve, the department is without authority of law to approve the selection.

"The decision rendered by the department in the case of State of California et al. (44 L. D., 468) is accordingly adhered to without prejudice to the State's right to substitute new base in support of the selection in accordance with the principle laid down in the case of State of California et al. (45 L. D., 644)."

17 That on November 15, 1917, the defendant the Commissioner of the General Land Office sought to make final the said decision of the defendant the Secretary of the Interior of October 18, 1917, by an office letter of the said commissioner to the register and receiver at Roswell, New Mexico, which contains this statement:

"In accordance with the said decision of October 18, 1917, and in the absence of prior valid adverse claim, you will advise the proper State officer that thirty days from receipt of notice hereof are allowed within which to designate other and valid base in support of his application to reinstate, and that in default of same within the time allowed, the order of cancellation of December 14, 1916, will be considered final and the case closed without further notice from this office."

XX. And the State of New Mexico says that it has now completely exhausted its rights of appeal, review, and rehearing in said Department of the Interior, and in said General Land Office, in respect of its claim under and by reason of said lieu selection, and that no further opportunity for hearing or review of the question aforesaid, or for the further assertion therein of its claim under such lieu selection, is afforded by the regulations and rules of practice of said department, or by any law or act of Congress in such case made and provided; and that its only remaining remedy is by appropriate ap-

peal to the courts for relief from the rulings aforesaid, and which rulings, as the State is advised by its counsel, and, accordingly, so avers, are erroneous in matters of law.

XXI. And the State of New Mexico further says that, by its full and unqualified acceptance of the grant of lands made to it by Congress for common school purposes as hereinabove mentioned, and by said State's full compliance with all the terms, conditions, and exactions of such grant, the right and title to the lands selected by it under its said lieu selection has been fully earned, and that the same are needed in partial satisfaction of such grant, and that the base assigned in such lieu selection has been, by said State, conveyed to the United States; but that, nevertheless, the right of the State of New Mexico in the premises is sought to be defeated by the unauthorized and arbitrary action of the defendants, as herein aforesaid.

XXII. And the State of New Mexico further states that if the certain action hereinabove set forth be permitted to stand, it will deprive the State of New Mexico of its rights under the land grant made to it by Congress as aforesaid and will impose conditions upon said State not provided for in said grant, will impair and diminish the value of said grant to said State and will unjustly and unlawfully exact from the State of New Mexico a consideration for the lands so selected by it, as aforesaid, different from the consideration therefor which has heretofore been conveyed to the United States by the deed of quit claim executed by said State's commis-
18 sioner of public lands which accompanied and was made a part of said lieu selection; will be in violation of the statutory contract accomplished and effected by said granting act of June 20, 1910, supra; will limit, and, to the extent of the tract of land described in said lieu selection as the base therefor, will defeat the will of Congress as expressed in said grant, and this too after the said grantee has performed, in full, the several conditions in consideration whereof the grant was made; and will further result in the rejection and cancellation of numerous other lieu selections by said State involving many hundreds of acres of land and in the unlawful deprivation of the property of the State of New Mexico without compensation, and without the consent of said State, all to its irreparable loss, damage, and injury, and for which the State of New Mexico has no adequate remedy at law, and is otherwise remediless, except in equity.

Wherefore, the premises considered, the State of New Mexico prays:

I. That the process of this court issue directed to the defendants, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, requiring them, and each of them, to appear and make answer under the foregoing bill of complaint, but not under oath, answer under oath being hereby expressly waived.

II. That, upon the filing of this bill, or at such short day thereafter as shall be fixed by the court, a preliminary order may issue herein restraining and enjoining, pendente lite, the defendants, their successors in office, and each, every and all persons claiming to act under their, or either of their, authority or control, from enforcing any or either of the certain rulings, holdings, and decisions mentioned and complained of in the foregoing bill of complaint, or from canceling or rejecting the certain lieu selection so heretofore made by the State of New Mexico of the W. ½ of section 29, township 23 south, range 38 east, New Mexico principal meridian, New Mexico, in lieu of the N. ½ of section 36, township 19 south, range 14 east, New Mexico principal meridian, New Mexico, or from exacting from the State of New Mexico a tract of land as base land for such lieu selection other and different from base land now offered and supporting such selection and heretofore conveyed by the State of New Mexico to the United States.

III. That, upon final hearing, said restraining order and injunction may be made perpetual, and that mandatory injunction may issue against said defendants, commanding and requiring that each of the certain rulings, holdings, and decisions aforesaid be vacated and set aside and that the right granted and secured to the State of New Mexico under the certain granting act herein aforesaid be recognized, respected, and given its full legal force and effect, excluding from any and all consideration in connection with the said State's lieu selection of the tracts aforesaid, the certain Executive proclamation of April 3, 1916, referred to in the foregoing bill of complaint.

19 IV. And that the State of New Mexico may have all such other and further relief as the nature of its case may demand and require, and as may be agreeable to equity.

THE STATE OF NEW MEXICO,
By HARRY L. PATTON,
Attorney General.
MILTON J. HELMICK,
Assistant Attorney General, Santa Fe, New Mexico.

PATRICK H. LOUGHRAN,
Attorney for Plaintiff, Washington, D. C.

The defendants to this bill of complaint are:

1. Franklin K. Lane, Secretary of the Interior.
2. Clay Tallman, Commissioner of the General Land Office.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Before me, the undersigned, a notary public in and for the county of Santa Fe, State of New Mexico, personally appeared Harry L. Patton, who, being by me first duly sworn, on oath, says: That he is

the attorney general of the State of New Mexico, said State being the plaintiff named in the foregoing and annexed bill of complaint; that he has read the foregoing bill of complaint and is acquainted with the contents thereof, and that the several matters and things therein set forth and contained are true, as he verily believes, and that as such attorney general he is authorized to file said bill.

HARRY L. PATTON.

Subscribed and sworn to before me this 28 day of Nov., 1917.

F. MULLER, [SEAL.]
Notary Public, Santa Fe County, New Mexico.

My commission expires July 1, 1921.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Before me, the undersigned, a notary public in and for the county of Santa Fe, State of New Mexico, personally appeared Milton J. Helmick, who, being by me first duly sworn, on oath, says: That he is the assistant attorney general of the State of New Mexico, said State being the plaintiff named in the foregoing and annexed bill of complaint; that he has read the foregoing bill of complaint and is acquainted with the contents thereof, and that the matters and things therein set forth and contained are true, as he verily believes.

MILTON J. HELMICK.

20 Subscribed and sworn to before me this 28 day of Nov., 1917.

[SEAL.] F. MULLER,
Notary Public, Santa Fe County, New Mexico.

My commission expires July 1, 1921.

Answer of Defendants.

Filed January 21, 1918.

* * * * * * *

Come now the defendants by their attorneys and, in answer to the bill of complaint herein filed, say:

1–9. They admit the averments of paragraphs 1 to 9 of this bill, except as to the conclusions of law therein contained.

10. They have no knowledge as to the facts averred in paragraph 10, except that they admit that the plaintiff has conformed to rules and regulations prescribed by the Department of the Interior in the matter of lieu selections of public lands.

11–14. They admit the averments of paragraphs 11 to 14, inclusive.

15. They admit the averments contained in the first paragraph of paragraph 15 of the bill. Photostatic copy of the face and reverse sides of the State selection known as Roswell 031,065, therein

referred to, is hereto attached, marked Exhibit A 1 and 2, and is hereby made a part of this answer.

Answering the averments of the second paragraph of said paragraph 15, they admit that said selection was accompanied by a nonmineral, nonsaline, and nonoccupancy affidavit, copy of which appears on the face of said Exhibit A; but deny that said selection was accompanied by a deed of quitclaim as averred in said paragraph. They also admit that said selection was accompanied by a certificate to the effect that the plaintiff had not conveyed or encumbered the title to the base land described in said selection; and copy of said certificate is hereto attached, marked Exhibit B, and is made a part of this answer.

Answering the averments of the third paragraph of paragraph 15, they admit that plaintiff paid the fees collectible by law and that the register and receiver certified to such facts, as appear in their certificate copied on page 2 of Exhibit A, but deny that they certified to any facts other than as appear in said certificate in connection with the filing of said selection.

Answering the final paragraph of paragraph 15, they are advised and consequently aver, that the same presents conclusions of law which they need not answer.

16. Answering the averments of the first paragraph of paragraph 16, they admit that plaintiff delivered said lieu selection to the register and receiver, Roswell land office, New Mexico, who received the same; but that whether said lieu selection thus delivered and received is, or amounts to, a perfect deed of conveyance, is, as they are
21 advised, purely a conclusion of law; and that if lieu selection does in law amount to a conveyance, then they deny that the register and receiver are the duly authorized and only agents of the United States competent to receive such conveyances, stating the fact to be that said officers are only authorized to receive said lieu selection for the purpose of transmitting the same to the defendants for ultimate action—that is, either to approve or reject the same.

Answering the second paragraph, they admit that said register and receiver duly transmitted the said lieu selection with their certificate, the same being defendants' Exhibits A and B aforesaid, to the Commissioner of the General Land Office, but state that the purpose thereof was to afford to the defendants opportunity for appropriate consideration and for action, not necessarily acceptance, upon the selection as required by statute. They admit that the selection was received on April 13, 1915, as averred, and that on August 23, 1915, proof of posting and publication of notice was also received as averred. They deny, however, that no question was raised as to the sufficiency of compliance with the requirements of law by the plaintiff in respect of said selection or that said selection was conceded to be perfect in every detail and unassailable on any ground or for any reason; and, on the contrary, they aver that said selection list was in part defective for the reason that a portion was invalid because not

supported by a sufficient amount of valid base; that when the said selection list was received by the Commissioner of the General Land Office and by him considered with a view of recommending to the Secretary of the Interior whether the said selection should be approved or disapproved, in whole or in part, he found and determined that a part of the base offered to support a part of the selection was insufficient, and held the same for cancellation by his decision of June 21, 1915, copy of which is hereto attached, marked "Exhibit C," and made a part of this answer; but thereafter, by affidavit, dated July 19, 1915, of the commissioner of public lands of the State of New Mexico, copy of which is hereto attached, marked "Exhibit D." and made a part hereof, the plaintiff adjusted its selection by the substitution of other base, which adjustment was thereafter allowed.

17. They admit the averments of fact contained in paragraph 17 of the bill.

18. They admit that plaintiff's said lieu selection was rejected by the Commissioner of the General Land Office on May 16, 1916, by decision, copy of which is hereto attached, marked "Exhibit E." and is hereby made a part of this answer; and that on October 14, 1916, said decision was affirmed on appeal to the Secretary in an opinion hereto attached, marked "Exhibit F," and made hereby a part of this answer.

19. Answering the averments of paragraph 19, they admit that thereafter and within the time limited by the Rules of Practice, plaintiff filed a motion for rehearing, and that said motion was denied, November 23, 1916, in a decision, copy of which is hereto attached, marked "Exhibit G," and made a part of this answer; and they further state that pursuant to said decision, the Commis-
22 sioner of the General Land Office, on December 14, 1916, in an order to the register and receiver aforesaid, copy of which is hereto attached, marked "Exhibit H," and made a part hereof, cancelled the lieu selections aforesaid, in part, including the land here in controversy, as more particularly set forth in said order.

Thereafter, they aver, the plaintiff applied for the reinstatement of this and other rejected lieu selections in a letter, dated December 28, 1916, copy of which is hereto attached, marked "Exhibit J," and made a part hereof; that said application for reinstatement was not acted upon, but thereafter, on plaintiff's petition for the exercise of supervisory authority, the subject matter of the controversy was again considered, and a decision was rendered, October 18, 1917, as averred in said paragraph 19 of the bill; copy of which decision is hereto attached, marked "Exhibit K," and made a part hereof.

They admit the averments of the final paragraph of said paragraph 19.

20. They admit all averments of fact in paragraph 20 of the bill.

21. They are advised that the averments of paragraph 21 present mere conclusions of law which they need not answer.

22. Answering the averments of paragraph 22, they deny that the action complained of will deprive the plaintiff of its rights under its school land grant or that it will impair or diminish the value of said grant; that, on the contrary, the action of which plaintiff complains has no further effect than to require said plaintiff to substitute valid base, i. e., lands within the terms of its grant which it has really lost, if the plaintiff is desirous of acquiring title to the particular tracts of land covered by its selection list aforesaid. They aver that by operation of the action complained of plaintiff retains title to the lands actually described in the land grant under which it claims, and that the plaintiff has sustained, and will sustain, no loss, damage, or injury, irreparable or otherwise, by reason of any action of the defendants set forth in its bill of complaint.

And in further answer to the bill, they aver the essential facts to be as follows: That plaintiff had title to the described base land under its school land grant, which said land was thereafter included within a national forest; that under existing law, the plaintiff had the privilege of waiving its claim to said land and to select other land of equal acreage, non-mineral in character, in lieu thereof, under the direction and subject to the approval of the Secretary of the Interior; that the Secretary's power to approve such an exchange depended upon the fact whether or not the base land was included within a national forest reservation; that, if such were not the fact, he had no authority to effect the conveyance of other public land of the United States to the plaintiff; that when the selection list described in plaintiff's bill came on in regular course before him for action, either to approve or disapprove the same and to effect or decline to effect the exchange of lands, he found and determined, and the fact is, that said base land had been excluded

23 and released from forest reservation and afforded no proper or valid base to support the selection of the land desired by the plaintiff and here in controversy; wherefore, exercising his discretion and discharging his duty within the limitations prescribed by existing law, he was unable to approve the exchange, and therefore disapproved the selection so long as it was based upon the particular tracts released from the forest reservation, permitting, however, the plaintiff within a reasonable time to substitute new base if it should continue to desire to acquire title to the selected lands; that his action, it being the action of which plaintiff complains, involved the exercise of judgment and discretion in a matter placed exclusively by law within his jurisdiction; and that the purpose and effect of this bill is wholly and merely to secure a review of his action by this court, as by direct appeal, where by law no such appeal or right of review by the courts is authorized or provided.

And they furthermore aver that as appears on the face of the pleadings herein, the determination of the matters of law and fact presented and the granting of the relief sought involve the title to

the land in controversy and require an adjudication by the court that by operation of matters of fact set forth in the bill and the law applicable thereto, title to said land has passed out of the United States and has vested in the plaintiff, notwithstanding the fact that said selection list, as to said land, stands rejected and canceled on the records of the land department, in the absence of the United States as a necessary party to the proceeding.

Wherefore, having made complete answer to the bill of complaint, they pray that said bill may be dismissed with their reasonable costs and that they may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

CHARLES D. MAHAFFIE,
Solicitor;
C. EDWARD WRIGHT,
Assistant Attorney.

(Here follow drawings marked pages 23A and 23B.)

24 EXHIBIT B.

(Copy.)

5402—Roswell.

List —. Serial 031065.

STATE OF NEW MEXICO,
County of Otero:

MAY 29, 1915.

I, Chas. E. Thomas, county clerk in and for the county and State aforesaid, do hereby certify that, according to the records of my office, the State of New Mexico has not sold, transferred, or in any manner conveyed, or incumbered, nor has it agreed to sell, transfer, or in any manner convey, or incumber, its title in or to the following described lands, to-wit:

Secs. 32–19S–14E and 36–19S–14E, N. M. P. M.

In witness whereof I have set my hand attached the seal of said county at my office in said Otero County, this 15th day of March, A. D. 1915.

CHAS. E. THOMAS,
County Clerk.

[SEAL.]

EXHIBIT C.

(Copy.)

Roswell 031065. "G," J. C. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 21, 1915.

Selection held for cancellation in part.

REGISTER AND RECEIVER, *Roswell, New Mexico.*

SIRS: On March 9, 1915, there was filed in your office by the State of New Mexico, indemnity school land selection 031065, in which the SE. ¼ SW. ¼, sec. 28, T. 23 S., R. 38 E., was selected in lieu of the SE. ¼ SW. ¼, sec. 32, T. 19 S., R. 14 E., within the boundaries of the Alamo National Forest.

An examination of the records of this office shows that on the same date the State offered 17.05 acres of the SE. ¼ SW. ¼, sec. 32, T. 19 S., R. 14 E., as part base in selection 031064, your series.

25 The SE. ¼ SW. ¼, sec. 28, T. 23, S., R. 38 E., is not, therefore, supported by sufficient amount of valid base, and the selection is hereby held for cancellation as to said tract.

You will notify the State hereof and allow thirty days from receipt of notice for an appeal to the department; in default of which, the cancellation will be made without further notice from this office.

Copy inclosed for service.

Very respectfully,

(Signed) D. K. PARROTT,
Assistant Commissioner.

EXHIBIT D.

(Copy.)

DEPARTMENT OF THE INTERIOR,

UNITED STATES LAND OFFICE AT ROSWELL, NEW MEXICO.

Serial 031065. "G," J. C. D. List 5402.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Robert P. Ervein, commissioner of public lands of the State of New Mexico, upon first being duly sworn deposes and says: That I am the official having in charge the selection of lands granted the State by acts of Congress, and the clerical work incident thereto: That in lieu land list No. 5401, serial 031064, by clerical error in offering base lands for the selection of lots 2, 3, and 4, sec. 28 T. 23 S., R. 38 E., 3.38 acres, 6.84 acres and 6.83 acres of the SE. ¼ SW. ¼, sec. 32, T. 19 S., R. 14 E., was given when it was the intention of the State to use the fractional parts of the SE. ¼ NE. ¼,

sec. 32, T. 19 S., R. 14 E., as base lands for the selection of said lots: Permission is therefore requested to make the necessary substitutions in lieu of lands so erroneously used.

ROBT. P. ERVEIN,
Commissioner of Public Lands.

Subscribed and sworn to before me this 19th day of July, 1915.

W. E. GRIFFIN,
Notary Public.

[SEAL.]

My commission expires July 17, 1917.

26 EXHIBIT E.

(Copy.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
Washington, May 16, 1916.

Selection held for cancellation in part.

REGISTER AND RECEIVER, *Roswell, New Mexico.*

SIRS: On March 9, 1915, the State of New Mexico filed in your office indemnity school land selection No. 031065, selecting therein in part the W. ½ N. ½ SE. ¼ and SW. ¼ SE. ¼, sec. 29, T. 23 S., R. 38 E., in lieu of the N. ½, N. ½ SW. ¼ and SW. ¼ SW. ¼, sec. 36, T. 19 S., R. 14 E., within the boundaries of the Alamo National Forest.

It is shown by the records of this office that by proclamation dated April 3, 1916, sec. 36, T. 19 S., R. 14 E., N. M. P. M., was eliminated from the Alamo National Forest, which in view of sec. 6 of the act of June 20, 1910 (36 Stat., 562), which reads in part as follows:

"That the grants of secs. two, sixteen, thirty-two, and thirty-six to said State, within national forest now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain," leaves the portion of the selection described unsupported by valid base, as no reason is known why the State may not assert title to said base tracts under the provisions of the act quoted.

The selection is therefore, hereby held for cancellation, subject to the right of appeal, to the department within thirty days from receipt of notice of the substitution of other and valid base therefor, within said time. You will notify the State thereof, and that in default of any action by it within the time allowed, the cancellation will be made, without further notice from this office.

Copy inclosed for service.

Very respectfully,

(Signed) C. M. BRUCE,
Assistant Commissioner.

5-12 M. S.

27 EXHIBIT F.

(Copy.)

DEPARTMENT OF THE INTERIOR,
Washington, October 14, 1916.

D-33272. "G." Roswell 031065, 031066, 031068, 033671.

State's Lieu Selections Canceled. Affirmed.

Ex Parte State of New Mexico.

Appeal from the General Land Office.

The State of New Mexico, by its commissioner of public lands, has appealed from the decisions of May 16, 24, and 26, 1916, holding for cancellation selections of lands in sections 29, 30, and 33, T. 23 S., R. 38 E., and in sec. 30, T. 14 S., R. 33 E., N. M. P. M., Roswell, New Mexico, land district, for the reason that the base lands offered are not properly subject to such exchange.

The base lands in question are in certain sections numbered 2, 16, and 36, which were within a national forest, but have recently been eliminated therefrom and remain a part of the grant for school purposes. The State's selection not having been approved prior to such elimination, can not now be allowed.

The decision is correct and is affirmed.

(Signed) BO SWEENEY,
Assistant Secretary.

28 EXHIBIT G.

(Copy.)

DEPARTMENT OF THE INTERIOR,
Washington, November 23, 1916.

D-33272. "G." Roswell 031065, 031066, 031068, 033371.

State's Lieu Selection Cancellation Affirmed. Denied.

Ex Parte State of New Mexico.

Motion for rehearing of departmental division of October 14, 1916.

The State of New Mexico has filed its motion for a rehearing of departmental decision of October 14, 1916, canceling its lieu selection of lands in secs. 29, 30, and 33, T. 23 S., R. 38 E., and in sec. 30, T. 14 S., R. 33 E., N. M. P. M., Roswell, New Mexico, and district.

The argument made, which is based on the allegation, in substance, that the decision erred in its consideration of the facts and in its application of the law thereto, can not be entertained. Both the facts and law were understood when the decision was rendered and in the absence of evidence now that would establish error the decision must be allowed to stand.

This case is in all respects similar to the case of State of New Mexico, Roswell 030929, this day decided, in which the questions presented are more fully discussed.

The motion is denied.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

29

EXHIBIT H.

(Copy.)

Roswell 031065–031066–031068 & 033371. "G," J. C. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, December 14, 1916.

Copies of departmental decision enclosed. Selections canceled in part.

REGISTER AND RECEIVER, *Roswell, New Mexico.*

SIRS: I am enclosing herewith copies of departmental decision of November 23, 1916, upon the State's motion to review departmental decision of October 14, 1916, in the above entitled cases, a copy of the last mentioned decision being also enclosed for your information and your files.

The selections are canceled as to the portions described. 031065 is canceled as to the W. ½, N. ½, SE. ¼ and SW. ¼, SE. ¼, sec. 29, T. 23 S., R. 38 E. 031066 is canceled as to the SE. ¼ SE. ¼, sec. 29, N ½, N ½ SW. ¼ and SW. ¼ SW. ¼, sec. 30, T. 23 S., R. 38 E. 031068 is canceled as to the S. ½ SW. ¼, sec. 33, T. 23 S., R. 38 E., while 033371 is canceled as to lots 1 and 2 of sec. 30, T. 14 S., R. 13 E., all of the selections mentioned being closed as to the portions described upon the records of this office. You will make such notations as are necessary upon your records and advise the State hereof by ordinary mail enclosing therewith a copy of the decision dismissing its motion for review.

Very respectfully,

(Signed) C. M. BRUCE,
Assistant Commissioner.

30 EXHIBIT J.

(Copy.)

State Land Office. Robert P. Ervein, Commissioner.

SANTA FE, NEW MEXICO, *December 28, 1916.*

Application for reinstatement.

Roswell 031065, 031068, 031066, and 033371.

The COMMISSIONER OF THE GENERAL LAND OFFICE,
Washington, D. C.

SIR: Referring to your letter "G," J. C. D., of December 14, 1916, involving the above serial numbers in the Roswell, New Mexico, land district, I hereby make application on behalf of the State of New Mexico for reinstatement of the above noted selections as to the lands canceled by the said letter. The ground for such reinstatement is that there is now pending before Congress Senate bill No. 7411, a copy of which is attached hereto, which if passed would validate such selections beyond all doubt. Another ground is that this office will at an early date, take action in a court of competent jurisdiction to compel the Department of the Interior to respect the rights of the State of New Mexico in this and similar cases now pending. Segregation of the lands from entry is requested in the interest of possible applicants who may seek to make entry of the lands in the meantime.

Respectfully,

(Signed) ROBERT P. ERVEIN,
Commissioner of Public Lands for New Mexico.

186

Posted in 94 May 23, 1917. F. H. C.

31 EXHIBIT K.

(Copy.)

DEPARTMENT OF THE INTERIOR,
Washington, October 18, 1917.

D-33272. "G." Roswell 031065.

State's Lieu Selection Cancellation Affirmed. Petition Denied.

STATE OF NEW MEXICO:

Petition for the exercise of supervisory authority.

The department has considered the petition for the exercise of supervisory authority filed on behalf of the State of New Mexico in the above-entitled case, wherein decisions were rendered, on appeal and motion for rehearing, October 14 and November 23, 1916, respectively, directing cancellation of the State's lieu selection 031065

as to the W. ½ and other lands in Sec. 29, T. 23 S., R. 38 E., selected in lieu of lands of equal area in Sec. 36, T. 19 S., R. 14 E., within the then boundaries of the Alamo National Forest.

Briefly stating such facts as are deemed necessary to the proper disposition of the case at bar, it appears that approved plat of survey of T. 19 S., R. 14 E., N. M. P. M., was filed in the local land office June 24, 1885. December 20, 1906, the entire township, embracing the lands offered as base in the particular case under consideration, was withdrawn for the then proposed Sacramento National Forest, and subsequently, by Executive order of April 24, 1907, was included therein, which reservation was later changed to the Alamo National Forest, by Executive proclamation of March 2, 1909.

March 9, 1915, the State filed the selection in controversy. By Executive proclamation of April 3, 1916, prior to approval of the indemnity selection, Sec. 36, T. 19 S., R. 14 E., was excluded from the forest reserve.

Prior adverse action herein was taken upon the ground that the base lands proffered, having been eliminated from the forest reserve prior to approval of the selection, the State retained title to said base lands under its grant as lands in place, and the department was, therefore, without authority of law to approve said selection, following the principle laid down in the case of State of California et al. (44 L. D., 468), wherein it was held:

> Where land within a national forest offered as base for a school indemnity selection is prior to approval of the selection eliminated from the forest the State is not entitled to have the selection consummated but takes title to the base land under the grant.

Among the several contentions urged by counsel for the State in exhaustive briefs filed, as well as upon oral presentation of the case to the department, it is asserted that the ruling cited is without authority of law, contrary to equity and unconscionable; that title to the base and selected lands involved vested in the United States and the State of New Mexico, respectively, upon proffer of the selection "upon the foundation of the principle that a grant in præsenti creates a present obligation upon the part of the grantor and a present interest in the grantee and that the obligation of the grantor is discharged and that the interest intended to be granted vests in the grantee when all the conditions of the grant have been fulfilled;" that by relation, title to the selected lands vests in the State and the base lands in the United States as of date of filing of the selection, and the duty of the department is limited or restricted to the approval of such selection, if regular when filed, regardless of the change in the status of the lands offered as base subsequent to the filing of the selection.

It is further insisted by counsel that the case at bar involves one of exchange, or lands offered in lieu of other lands title to which was in the State at the date the selection was filed, as distinguished from one involving a question of indemnity for a loss of lands within a school section title to which did not pass to the State under its

grant, and that in the former class of cases, the State having waived title to the base lands, or completely parted with title thereto, as an offer on its part to select other lands in lieu thereof, the department is without authority of law to compel the State to reacquire title to such base lands.

The petition also asserts that the State having accepted the offer to surrender lands in place, subsequently included within a reservation, in exchange for other lands, the department is without power, on account of conditions arising subsequent to the tender of the selection, or change in the status of the base lands, to violate the executed contract and withhold approval of the selection without specific authority of Congress.

In the first place, under the laws applicable hereto, sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), and the enabling act of June 20, 1910 (36 Stat., 557–565), there remains no doubt but that the State may waive its right to lands in place granted under the acts above cited where, subsequent to acquiring of title by the State, said lands were placed within the forest reservation. The Supreme Court of the United States, in the case of California v. Deseret Water, Oil and Irrigation Company, wherein opinion was rendered March 26, 1917, cited in brief of counsel for petitioner, after quoting the first proviso to the act of February 28, 1891, supra, "Where any State is entitled to said sections sixteen and thirty-six, or where said sections are re-
33 served to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections," held;

This language, while not as clear as it might be, operates, as we interpret it, to give to the State a right to waive its right to such lands where, as in this case, the same are included in a forest reservation after survey, that is, after the title vests in the State. Unless this proviso refers to lands, the title to which has passed to the State, it adds nothing to the statute and performs no office whatever. This construction preserves the integrity of forest reservations, and permits the State to acquire other lands not surrounded by large tracts in such reservations which are withdrawn from settlement.

The ruling of the Supreme Court of the United States in the case cited is limited merely to the right of the State to waive its interests in the lands offered as base and does not, directly or indirectly, hold that the department, in determining the State's rights under a selection such as the one under consideration, where the base lands have been eliminated from the forest reservation prior to approval of the selection, has no alternative other than to perform the ministerial act of approving such a selection.

The department is clearly of the opinion that the phraseology of the act of February 28, 1891, supra, taken as a whole, and especially that portion of the act providing that "the selection of such lands in lieu thereof by said State or Territory shall be a waiver of

its right to said sections," does not warrant any such construction being placed thereupon as would permit of the term "waiver" of the base lands as being tantamount to the vesting of fee simple title thereto in the United States prior to the department's approval of the selection.

The mere waiver of the base lands, or proffer thereof by the State, does not of itself pass title thereto until accepted by the department by its approval of the selection. The department has long held that approval and certification by the department of the lands selected are a necessary prerequisite to the vesting of title to the selected lands in the State, and it is obviously true as well that title to the base lands tendered in support of such a selection does not vest in the United States until such a selection shall have been approved.

In the case of Hall v. State of Oregon (32 L. D., 565), the department in affirming the action taken by the Commissioner of the General Land Office in rejecting a timber and stone application filed by Hall for lands covered by the indemnity school land selection of the State, held:

It is true, as claimed in the appeal, that until approved by the Secretary of the Interior there is in reality no selection, the proffer of a list and showing in support thereof being only preliminary proceedings taken for that purpose, but in the orderly administration of the land laws this department has uniformly accorded to an indemnity school land, railroad, or other selection made in accordance with an act of Congress, pending its final consideration
34 and disposal by this department, the same segregative effect as an original entry made under the homestead or other public land law.

In the case of State of California et al. (41 L. D., 592), it was held that——

No title is acquired under or by virtue of a school indemnity selection until the same has been approved by the Secretary of the Interior; and where the lands embraced in a selection are classified as oil lands and withdrawn under the provisions of the act of June 25, 1910, the Secretary is without authority to approve the selection in the face of such withdrawal; but it should be rejected, without prejudice to the right of the State to submit showing with a view to securing reclassification of the lands and to apply anew therefor in event of their restoration.

The department, in determining what effect a withdrawal under the act of June 25, 1910 (36 Stat., 847), had upon lands applied for under forest lieu, railroad and State selections, after mature consideration of the question as to whether or not by the mere proffer of a State selection title to the lands sought to be selected thereby unqualifiedly passed to the State or other applicant therefor, as the case might be, laid down the administrative ruling (43 L. D., 293), that——

The acts of Congress authorizing exchanges are merely offers on the part of the United States to exchange other lands for lands held by the selector, and the right of the selector does not attach nor equitable title pass upon the presentation of the requisite papers. There remains the necessity for action upon the offer by the duly authorized officer of the United States. Until that acceptance has been given and the equitable title passed, Congress has full authority to devote the land to a public purpose.

Again, in the case of State of Wyoming (45 L. D., 590), the department citing pertinent decisions by the United States Supreme Court, held that——

Title does not vest in the State under a school indemnity selection until the selection has been duly approved; and a discovery of mineral prior to such approval will defeat the selection.

It is manifest from the rulings cited that it has long and repeatedly been held by this department that there is, in fact, no selection where approval of the department is necessary to give the same validity, until such approval is executed by the department. The department, therefore, cannot concede that the State's contention upon this petition is sound, that the State takes title to the selected lands and the Government title to the base lands upon the mere proffer of selection to the Government prior to its approval by the department.

The contention that by relation titles to the base lands and selected lands pass upon the presentation of a perfected selection is equally without merit. With respect to this feature of the case it may with propriety be stated that the department has invariably adhered to the rule of long standing that a selection, regular on its face when filed, such as the one under consideration, has the same segre-
35 gative effect as a homestead or other entry under the general land laws as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications so that after the selection shall have been approved the State's rights relate back to the date of filing, and are superior to those asserted subsequent to the filing of the selection and prior to its approval. This only is the extent to which the doctrine of relation has application. (See 27 L. D., 475; 32 L. D., 565; 33 L. D., 161; 34 L. D., 12; 39 L. D., 377.)

The department is fully convinced that title to the selected lands does not vest in the State by the mere proffer of a perfected selection, and the question remaining to be answered is, if title to the selected lands does not pass to the State upon the proffer of a selection, until the selection is approved and certified by the department, does title to the base lands tendered in support of that selection, upon presentation of such a selection, pass from the State to the Government, prior to the acceptance and approval of the selection by the department?

In the case of Edwin Collins (40 L. D., 444) the department, in rejecting a homestead application filed by Collins for lands previously tendered by the State of Idaho as base for school indemnity selection held that—

Lands within a school section assigned by the State as base for indemnity selection is not subject to entry, selection, or other appropriation under the public land laws until the selection is approved and title to the base land revests in the United States.

In the case of Smith v. State of Idaho (40 L. D., 554), the department adhered to the rule as laid down in the case last cited, holding that—

Land within a school section assigned by the State as base for indemnity selection is not subject to appropriation, entry, or selection under the public land laws until the selection is approved and title to the base land becomes vested in the United States.

Again, in the case of John W. Schofield (42 L. D., 538), the department held that—

The legal title to a tract of school land relinquished as base for indemnity selection does not revest in the United States until the selection is approved, and prior to such approval the relinquished land is not subject to entry, selection, or other appropriation under the public land laws; but where settlement was made upon land so relinquished prior to approval of the selection based theron, or the faith of statements by the State land commissioner that the State did not claim the land, and application to enter filed by the settler, such application should not be rejected outright but held and considered in connection with the selection, and if the selection be approved, the settlement right should be recognized and protected.

In the more recent case of State of California et al. (45 L. D., 644), analogous to the case at bar, the department, after distinguishing the case cited from that of Robinson v. Lundrigan (227 U. S., 173), reaffirmed the ruling as laid down in the case of
36 State of California et al. (44 L. D., 468), the legality of which is questioned upon this proceeding, and held that elimination of the base from the forest reserve prior to approval of selection, notwithstanding that the reserve was created subsequent to the date title to the base lands passed to the State under its grant as lands in place, defeated the selection, but that the State would be permitted, if it so elected, to substitute new base in support of the selection.

In passing upon the question as to whether or not title to the base land vests in the Government upon the mere waiver thereof on the part of the State, or upon the tender thereof in support of a selection, it is deemed appropriate here to make mention of the fact that the various States have for years tendered relinquishments of selections pending before the department for approval, and the department has invariably accepted the relinquishments of the selections. Had the proffer of the selection by the State and its waiver of title as to the base lands vested title in the Government, it would require the

issuance of a patent to revest the State with title. (See 27 L. D., 474.)

The department therefore concludes that the State took title to the base lands tendered in support of the selection under its grant, that title thereto was at all times thereafter, prior and subsequent to restoration of said lands from the forest reservation, and is now, in the State of New Mexico, and the very condition, upon which the right of the State to offer said lands in exchange for others is predicated, having been removed by elimination of the base lands from the forest reserve, the department is without authority of law to approve the selection.

The decision rendered by the department in the case of State of California et al. (44 L. D., 468), is accordingly adhered to, without prejudice to the State's right to substitute new base in support of the selection in accordance with the principle laid down in the case of State of California et al. (45 L. D., 644).

The petition must be and is hereby denied.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

Opinion.

Filed September 7, 1918.

* * * * * * *

Hearing on bill and answer.

The bill of complaint in this case is filed by the State of New Mexico against the Secretary of the Interior and the Commissioner of the General Land Office. The relief it seeks is (1) a prayer for process; (2) a preliminary restraining order, restraining and enjoining pendente lite the defendants, etc., from enforcing any or either of certain rulings, holdings, and decisions set out in the bill of complaint or from cancelling or rejecting a certain so-called
37 "lieu selection" described in the bill or from exacting from the plaintiff State a tract of land as base land for such lieu selection other and different from the base land offered by and supporting such selection by the State; (3) that upon a final hearing such restraining order may be made perpetual and that a mandatory injunction may issue against the defendants commanding and requiring each of said rulings to be vacated and set aside and that the right granted and secured to the plaintiff State under a certain granting act set forth in the bill be recognized, respected, and given its full legal force and effect, excluding from any and all consideration in connection with said lieu selection a certain Executive proclamation of April 3, 1916, mentioned in the bill; and (4) prayer for general relief.

Stating the case made out by the bill in its briefest form, it may be said that the plaintiff is seeking by the relief prayed for to secure

to itself what is described in the bill as State lieu selection 031065, Roswell series, being a selection by the State of the west half of section 29 of township 23 south, range 38 east, the same being included in an official plat of survey made by the Federal Government and filed in the local land office of the district wherein the said land is situated in the State of New Mexico, the said plat having been filed as stated March 9, 1915, this selection being in lieu of the north half of section 36 of township 19 south, range 14 east, which at the time of the selection was situated within the exterior boundary lines of what is known as the Alamo National Forest Reserve. The land in lieu of which the said selection was made was a portion of school lands granted by the Federal Government to the then Territory of New Mexico and confirmed to the plaintiff State in the enabling act by which the Territory of New Mexico was admitted as a State of the Union.

The bill of complaint sets forth the various statutes under which it claims the selected land and reference to one or more of them will be made hereafter in this opinion.

The answer of the defendants to the bill of complaint admits all of the material allegations of fact set forth in the bill of complaint save and except the allegation found in the second paragraph of paragraph numbered fifteen of the bill of complaint, which alleges that the lieu selection in question was, among other things, "accompanied with a deed by quitclaim executed by the State land commissioner of the State of New Mexico in accordance with authority given that officer by the act of the Legislature of the State of New Mexico of June 14, 1912, supra, conveying to the United States all the right, title, claim, interest and estate of said State" in and to the land (usually described as base land) in lieu of which the selection claimed by the plaintiff State was made, the denial of the answer in this particular being that they, the defendants, "deny that said selection was accompanied by a deed of quitclaim as averred in said paragraph."

The issue thus made on this allegation of the will has not been urged by counsel for the defendants as material, either in the oral argument or in the briefs that have been filed, these proceeding apparently upon the theory that there are no substantial issues
38 of fact raised by the pleadings and that the suit can be decided on the question or questions of law that are presented by the pleadings and that have been argued by counsel for the respective parties.

The question upon which this suit may, and indeed, in the opinion of the court, should be determined is within a narrow compass. It has been discussed with ability by counsel for the respective parties and, on behalf of the plaintiff, from every aspect that seems rationally conceivable. It may be stated thus: Has the Federal Land Department, including the Commissioner of the General Land Office and the Secretary of the Interior, the power or authority to reject and cancel a so-called "lieu land section" made by a State in sub-

stitution or place of so-called "base" land that had been first withdrawn by the United States Government for forest reserve purposes, and then before final action by the officials mentioned on the selection made by the State in lieu of such base land, had been released or eliminated from such forest reserve?

There is no disputed question of fact to embarrass or to be determined as a preliminary to the determination of the question of law thus presented.

The bill of complaint alleges, after setting forth the performance by the plaintiff of all acts required to be performed by it in making its selection, including the execution and delivery by it to the local register and receiver as the authorized agents of the United States to receive it, of a conveyance of the State's right, title, interest, etc., in the base land to which reference has been made, as follows:

"That in accordance with the rules, regulations, and practice of the Department of the Interior, the said register and receiver duly transmitted said conveyance and said certified lieu selection to the Commissioner of the General Land Office for appropriate consideration and ultimate acceptance by the Secretary of the Interior of such conveyance and the approval by said Secretary to the State of New Mexico of the land it had selected as the consideration for the lands it had reconveyed to the United States."

No question seems to be raised of the power or authority of the President to include the base land within a forest reservation or thereafter to release and eliminate it therefrom, provided that the State's right to make a selection in lieu thereof is not impaired thereby.

It is, however, insisted by the State that when it complied with all requirements of law in the making of a selection, and the same was before the Secretary of the Interior "for appropriate consideration and ultimate acceptance," the release and elimination by the President of the base land from the forest reserve, prior to action by the secretary, could not defeat the selection, or justify its rejection and cancellation, and the Secretary had no function to perform or choice of action save that of approving the selection and thus affording the evidence or muniment of the State's title to the selected land, which, it is contended by the State, vested in it the moment it completed the steps required by the law to be taken by it
39 in the process of making a selection. This contenion, if well founded, leaves to the Secretary no duty to perform except to see that the necessary steps have been taken by the State, and thereupon formally to approve the selection.

The plaintiff State had completely performed all acts required by law of it in the making of a selection by August 23, 1915, and the General Land Office officially apprised of the fact by that date. No action seems to have been taken by the land office on the selection until after the President, some seven months and ten days later, to wit, April 3, 1916, released and eliminated the base land from the forest reservation, and then on May 16, 1916, the defendant

commissioner held the selection for cancellation because of the presidential action which left, according to the commissioner, "the portion of the selection described unsupported by valid base, as no reason is known why the State may not assert title to said base tracts under the provisions of the act quoted." (Act of June 20, 1910, 36 Stat. 562.) On October 14, 1916, the defendant, Secretary of the Interior, affirmed this action of the commissioner, and on November 23, 1916, in a decision denying a motion for a rehearing, adhered to his earlier position, and in doing so cited the decision of the department in the State of California et al., 44 L. D., 468, rendered October 7, 1915, which is directly in point.

As has already been pointed out, the so-called base land upon which the lieu land selection claimed by the plaintiff is founded constituted a part of the school land grants made by the United States to the plaintiff in the days while it was still a Territory, this grant apparently having been made by the act of Congress approved June 21, 1898 (30 Stat. 484–5), this statute making a grant of sections 16 and 36 in every township in the then Territory, now State, of New Mexico. But on December 20, 1906, the particular section 36, a portion of which is the base land referred to, was withdrawn for the proposed Sacramento National Forest, which later was renamed the Alamo National Forest. The right to lieu land selections, so far as the claim of the plaintiff State is concerned, is to be found in sections 2275 and 2276 of the Revised Statutes as amended by act of February 28, 1891 (26 Stat. 796). The material portions of these sections may be here quoted:

Sec. 2275.

* * * * * * *

"other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, *the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its rights to said sections.*

* * * * * * *

And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory *shall be entitled to select indemnity lands* to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations; Provided, however, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such

military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

Sec. 2276. "That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur."

(Underscoring by court.)

The right thus given was confirmed to the plaintiff State in the enabling act admitting it to the Union of June 20, 1910 (36 Stat. 557). By section six of this act, there was granted to the State additional sections; that is, additional to sections 16 and 36 in each township, the additions being sections 2 and 32 in said townships, and they were granted, according to the terms of the act, to the State for the support of common schools, and wherever any of these sections or parts thereof were unavailable because they were mineral lands or had been sold, reserved, or otherwise appropriated or reserved by or under authority of any act of Congress, the provisions of section 2275 and 2276 of the Revised Statutes were made applicable thereto

"and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: * * * And provided further, That the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain: but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situate within said
41 forest reserves, whether surveyed or unsurveyed, *and for which no indemnity has been selected*, may bear to the total area of all the national forests within said State, the area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated.

* * * * * * *

"Sec. 10. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, *are hereby expressly transferred and confirmed to the said State*, shall be by the said State, held in trust, to be disposed of in whole or in part only in manner as herein provided and for the

several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Sec. 11. That all lands granted in quantity *or as indemnity by this act shall be selected, under the direction and subject to the approval of the Secretary of the Interior*, from the surveyed, unreserved, unappropriated, and non-mineral public lands of the United States within the limits of said State, by a commission composed of the governor, surveyor-general, or other officer exercising the functions of a surveyor-general, and the attorney general of the said State."

(Underscoring by court).

From the foregoing extracts, it is to be noted, first, that by section 2275 the right of selection by the State is granted without exception or qualification excepting, as provided in section 2276, that the land that may be selected by the State must be so selected from any unappropriated, surveyed public lands, not mineral in character. At the time of the selection made by the State in this case, the land selected by it was of unappropriated, surveyed public land, not mineral in character, and indeed appears to have been land perfectly free for such selection. It is further to be noted that by section 2275, the selection was made to constitute, in imperative terms, a waiver of the State's right to the section or part thereof in lieu of which the selection was made, the language of the statute being "the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections." Contemplating the possibility that some of the townships which included the sections granted to the State for school purposes might be included within Indian, military, or other reservations, the Secretary of the Interior is required by this statute to ascertain and determine by protraction or otherwise the number of such townships without actually awaiting the extension of the public surveys, and that thereupon the State "shall be entitled to select indemnity lands": and by the proviso in said section it is further enacted that nothing contained in the
42 statute shall prevent a State from awaiting the extinguishment of any such reservations and the restoration of the lands therein to the public domain and then taking therefrom the sections originally granted. As has already been pointed out, at the time that the plaintiff State exercised the right given to it by the provision of law from which quotations have been made, the base land was then within a defined forest reservation, and its selection of the land, which at that time was clearly subject to selection by it, constituted a waiver of its right to the base land.

Again, by the provisions of the enabling act that have been quoted, the duty imposed upon the Secretary of the Treasury to pay over to the State as income for its common school fund out of the gross proceeds of the national forests within the State, was conditioned

upon the fact that the State had not selected lieu or indemnity lands for that included within the national forests.

What is the right of selection thus given? That question almost answers itself. Clearly it means a right of unhampered choice within the limitations contained in the legislation, and making that choice the State at the same time waived its right to the base land upon which such selection or choice rested.

It is undoubted that the Secretary of the Interior could prescribe reasonable rules and regulations for the exercise by the State of the right of selection or choice thus given, and it is understood that such rules and regulations were long ago promulgated, and in the instant case faithfully observed by the State. Hence, when the General Land Office had been officially advised by its local register and receiver that the State had complied with all of the rules and regulations referred to and its selection was before the commissioner for action, what power did either he or the Secretary of the Interior have over the selection thus made beyond seeing to it that the rules and regulations governing the exercise of the right of selection had been observed, and that the land so selected was neither mineral nor appropriated for any of the public purposes mentioned in the legislation? Does the law give to either of the defendants the right of arbitrarily rejecting a selection made? Could either of them say to the State, in effect, "I don't like your selection. Make another one, and I will consider it when you have submitted it as required by our rules and regulations"? If so, is there any limit to such power and authority, and what then becomes of the right of selection by the State? Such an interpretation of the law would be, so far as the State is concerned, very much like "keeping the word of promise to the ear and breaking it to the hope."

It is claimed on behalf of the defendants that by section 11 of the enabling act, land selected by the State must be selected "under the direction and subject to the approval of the Secretary of the Interior." Undoubtedly "under the direction" of the Secretary, who had a right to withhold his approval of a selection made if, upon examination, he discovered that it had not been made in accordance with the rules and regulations promulgated by him, or that no sufficient amount of base land was proffered for the selection, or
43 that the land selected was not subject to selection under the limitations of the statutes. But, if it appeared that the rules and regulations had been observed by the selecting State, and that appropriate base land was proffered for the selection, and that the land selected was subject to selection under the statutes, does the language of section 11 give the Secretary the right to say to the State, "I don't like your selection. I won't approve it. You must make another one and when you have made it I will consider that selection. I may not like it, and you will have to make a still further selection." And so on, until by a series of disapprovals the Secretary could coerce the State in an indirect manner to select the land that he desired the State to select and none other. In the opin-

ion of the court no such power and authority was intended to be given to the Secretary by this section. The court is of opinion that, within the limitations that have been enacted, the right of the State in the making of its selection is an unqualified one that cannot be hampered or restricted by the defendants or either of them. Their duty is confined to seeing to it that in making a selection base land of the requisite quantity is proffered; that the land selected is outside of any of the exceptions mentioned in the statute that deny selection to such lands, and that all reasonable rules and regulations promulgated by the Secretary to be followed and observed in the exercise of the right of selection had been so followed and observed, and, these conditions appearing, they had no other power or authority than to approve the selection so made.

The court is further of the opinion that this approval did not in and of itself vest the title to the selected lands in the State. That was accomplished by the selection itself and the approval of the Secretary was but a required record of a fact theretofore accomplished.

All of the conditions required of the State had been fully performed and met by it, the fact officially before the General Land Office and had been for over seven months when by Executive proclamation the base land upon which the selection was founded was eliminated or released from the Alamo National Forest Reservation, and because it was, the defendant commissioner, about something over a month following the proclamation, held that the selection was ineffective because subsequent to its being made the base land ceased to have the character required for the purposes of selection; that is, it had ceased to be within a reservation. And so, if this view is sound, the State now finds itself back where it started. Is it sound? The present very able Secretary of the Interior so holds, affirming the defendant commissioner, and in doing so follows his decision in the State of California case reported in 44 L. D., 468.

The court, however, is unable to concur in the opinions of the defendants in this matter. The court is of opinion that a right is acquired by the State by its selection prior to approval by the proper officer of the United States, and that right cannot be disturbed by a subsequent change in the status of the base land. Its right to the base land upon selection is declared by Congress to be waived. Does this mean anything less than that its right is gone? If gone,
44 what under the law restores it? To hold otherwise would be, it seems to the court, to leave the State at the mercy of executive officials who, acting no doubt from the highest motives, may nevertheless in their proper zeal for the conservation of wise policies with relation to the disposition of the public lands impair or attempt to impair rights that have become vested. And this, the court thinks, would happen to the State in this case, unless it can secure the relief it seeks.

With respect to legislation very similar to that which we have been considering, the forest act of June 4, 1897, the Supreme Court in

the case of Daniels vs. Wagner (237 U. S., 547), in dealing with a claim made on behalf of the Secretary of the Interior to discretionary power in the approval or rejecting of lieu land selections, said (p. 558):

"And it becomes moreover certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation."

The pending case presents no such question as was before the Supreme Sourt in Cosmos Company v. Grey Eagle Company (190 U. S., 301). There the sufficiency of the lieu land selection under consideration in that case had been challenged by the appellee by a protest that had been filed within the time permitted by the regulations of the land office and the questions arising thereunder were at the time of filing of the bill in that case still pending undisposed of before the General Land Office; and the court held that the question thus raised being still properly before the department the courts could not take jurisdiction and proceed to decide such questions themselves. But the court also reiterated the established rule that the courts will not be bound by the decision of the Land Department upon questions of law, it declaring in the course of its opinion, at page 314, that "Its (Land Department) decision on any legal question would not, of course, be binding on the courts whenever such a question may properly arise in any future legislation."

The contentions made on behalf of the defendants proceed apparently upon the theory that when the State came to exercise its right of lieu land selection, the selection so made and submitted to the Land Department constitutes an offer of the State to exchange base land for the lieu land. It does not seem to the court that this is sound, if for no other reason than that it destroys at the threshold the character of the selection or choice which, as has already been stated, is, in the opinion of this court, what Congress intended to give to the State under the circumstances presented. In a
45 sense, of course, there is an offer; that is, the State presents its selection to the Secretary for approval, the approval, however, involving the consideration of such matters as have heretofore been set out in this opinion. Certainly when approval is given to a selection the title of the State to the land selected relates back to the time when the selection was made by the State. So the Supreme Court holds in the case of Weyerhaeuser v. Hoyt (219 U. S., 380), in dealing with lieu land selections under a railroad land grant. The fol-

lowing language is taken from the syllabus of that case and seems to be borne out by the text of the opinion:

"The power of the Secretary to approve selections is judicial in its nature, and implies the duty to determine as of the time of filing the selection, and the doctrine of relation applies to decisions as to the validity of such selections."

If the quoted language is to be given its plain import it is to be at once seen by the facts in the pending case that at the time of the filing by the State of its selection its validity was not subject to question.

Without, therefore, intending in any manner to question the right and the power of the Secretary to approve selections made under the circumstances and law applicable to the present case, the court is of opinion that approval cannot be withheld if it shall appear that the land selected was free for that purpose. It is to be observed that we are here dealing with the legislation enacted in the interest of the plaintiff State, together with such other general legislation as has been noted as also applicable, and in the final analysis the court holds that the presidential proclamation eliminating or releasing the base land in this case from the Alamo National Forest subsequent to the complete and perfected selection by the State of lieu lands could not operate to destroy the character as base land for the purposes of such selection, it being good base land for this object at the time of the selection, and the selection itself constituting, as has been pointed out, a waiver of the State's right to the base land; and the selection in all respects being perfect and unobjectionable, the right of the State is to be determined as of the time of completing or perfecting its selection.

In view of the foregoing, a decree granting the relief prayed will be signed upon presentation and notice.

F. L. Simms, *Justice.*

September 7th, 1918.

Decree.

Filed September 25, 1918.

* * * * * * *

This cause came on to be heard on bill and answer and was argued by counsel. After consideration thereof it is by the court this 25th day of September, 1918,

Ordered and decreed, That the defendants, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, and all persons claiming to act under the authority, direction, or control of either of them, be, and they hereby are, permanently restrained and enjoined from enforcing any or either of the rulings, holdings, and decisions made and rendered by them in furtherance of their purpose of effectuating, with respect to that certain selection and appropriation of the west half of section twenty-nine of township twenty-three south, in range thirty-eight east, of the New Mexico principal meridian [illegible]

of New Mexico in lieu of the north half of section thirty-six of township nineteen south, in range fourteen east, of the same meridian and in the same State, which selection was made by the State of New Mexico under the grant to it by Congress of public lands of the United States for the support of common schools and is more fully described in the bill of complaint filed herein, that rule of decision announced by First Assistant Secretary of the Interior Andrieus A. Jones on October 7, 1915, in the proceeding in the Department of the Interior entitled as State of California et al., such rule and decision being reported in the forty-fourth volume of the Decisions of the Department of the Interior relating to public lands, at page four hundred and sixty-eight thereof; and it is further

Ordered and decreed, That the said defendants, and each of them, and their successors in office, and all persons claiming to act under the authority, direction, and control of either of them, be, and they hereby are, commanded and required to recognize, respect, and give full legal force and effect to that certain selection and appropriation which is mentioned in the preceding paragraph of this order and decree, and to do so in the due exercise of lawful judgment and discretion without imputing to a certain Executive proclamation of April 3, 1916 (39 United States Statutes at Large, part two, at pages 1774, 1775), eliminating the said north half of section thirty-six of township nineteen south, in range fourteen east, of the said meridian and in the State of New Mexico from the Alamo National Forest any effect whatsoever upon such selection and appropriation.

By the court:

F. L. Siddons, *Justice.*

Whereupon the defendants, by their attorney, in open court noted an appeal from the aforegoing decree to the Court of Appeals of the District of Columbia; and it is hereby, on the day aforesaid,

Ordered, That the appeal be allowed and that execution of said decree be, and the same hereby is, stayed pending said appeal.

By the court:

F. L. Siddons, *Justice.*

No objection as to form.

C. E. Wright, *Atty. for Defts.*

47 *Assignment of errors.*

Filed October 2, 1918.

* * * * * * *

The appellants assign the following errors in the decision and decree of court in the above entitled suit:

1. The court erred in not dismissing the bill of complaint;

2. The court erred in not holding and deciding that the act of the defendants sought to be enjoined involved the exercise of judgment and discretion on the part of the defendants in a matter exclusively within their jurisdiction to decide and determine and, as such, is not subject to review by a court in any direct proceeding;

3. The court erred in entering a decree, save of dismissal, in this cause in the absence of the United States as a necessary party to the suit.

4. The court erred in holding and deciding that the mere act of a State in selecting lieu lands under the act of February 28, 1891 (26 Stat., 796), amendatory of sections 2275 and 2276 of the Revised Statutes, vests title in the State to the selected land.

5. The court erred in holding and deciding that the presidential proclamation eliminating the State's base land from the national forest did not have the effect of destroying its character as base land within the meaning of the acts of Congress under which the plaintiff sought an exchange of lands.

6. The court erred in decreeing and ordering the defendants to readjudicate the plaintiff's application to select land by substituting the judgment and ruling of the court for the judgment of the defendants in a matter confided by law exclusively to them to decide and determine.

7. The court erred in granting the injunction sought in plaintiff's bill.

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

Designation of record.

Filed October 2, 1918.

* * * * * * *

In preparing transcript of the record on the appeal of the defendants in the above entitled suit, the clerk of the court will please to include therein the following:

1. The bill of complaint.
2. The answer of the defendants and the exhibits.
3. The opinion of the court.
48 4. The decree and notation of appeal and stay of execution.
5. The assignment of errors.
6. This designation.

C. EDWARD WRIGHT,
Attorney for Defendants.

Service acknowledged this 1st day of October, 1918.
PATRICK H. LOUGHRAN,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 72, both inclusive, to be a true and correct transcript of the record,

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 35624 in equity, wherein State of New Mexico is plaintiff and Franklin K. Lane, Secretary of the Interior, et al. are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 6th day of November, 1918.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 3221. Franklin K. Lane, Secretary of the Interior, et al., appellants, vs. State of New Mexico. Court of Appeals, District of Columbia. Filed Nov. 6, 1918. Henry W. Hodges, clerk.

49 TUESDAY, *May 6th, A. D. 1919.*

FRANKLIN K. LANE, SECRETARY OF the Interior, et al., Appellants,
vs.
STATE OF NEW MEXICO.
No. 3221. April term, 1919.

It is stipulated that the above entitled cause may be heard and determined by the Chief Justice and Mr. Justice Robb, in the absence of Mr. Justice Van Orsdel.

C. EDWARD WRIGHT,
Counsel for Appellant.
PATRICK H. LOUGHRAN,
Counsel for Appellee.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
STATE OF NEW MEXICO.
No. 3221.

The argument in the above entitled cause was commenced by Mr. C. E. Wright, attorney for the appellants, and was concluded by Mr. P. H. Loughran, attorney for the appellee. On motion, the appellant is allowed to file additional authorities herein.

50 In the Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
STATE OF NEW MEXICO.
No. 3221

Opinion.

Mr. Justice ROBB delivered the opinion of the court:

Appeal from a decree in the Supreme Court of the District, after hearing on a bill and answer, enjoining appellants from enforcing a decision holding for cancellation a lieu land selection of the State of New Mexico, the ground of that decision being that, subsequent to such selection but prior to final action thereon by the Interior Department, the base land again had been made available for school purposes by a change in the boundaries of the Alamo National Forest.

The north half of section 36 was granted to the State of New Mexico for school purposes (30 Stat., 484, 485; 36 Stat., 557), and is conceded that the State's title thereto was absolute. Subsequently the Alamo National Forest was created, which surrounded the above grant. By section 6 of the act of June 20, 1910 (36 Stat., 557), the provisions of sections 2275 and 2276, R. S., as amended by the act of February 28, 1891 (26 Stat., 796), were extended to New Mexico. Section 2275 provides for lieu land selections and declares that such selections shall be a waiver of the right of the State to the base lands. Section 2276 provides that the lands appropriated by section 2275 "shall be selected from any unappropriated, surveyed public lands, not mineral in character," and section 11 of the act of 1910 provides "that all lands granted in quantity or as indemnity by this act shall be selected under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said State," etc.

51 It is conceded that, as the title to the base land was in New Mexico when the Alamo National Forest was created, the State had a right to exchange this land for other land in lieu thereof; and, further, that the land embraced in this lieu land selection was "surveyed, unreserved, unappropriated, and nonmineral" public land. In other words, the sole contention of the department is that the boundaries of the national forest having been changed subsequent to the filing of the lieu land selection, so that the base land in question was not embraced therein, the statutory basis for the exchange had ceased to exist.

In California vs. Deseret Water, &c., Co. (243 U. S., 415), it was ruled that when a forest reserve is made to include a school section previously surveyed, as in this case, the State may waive its right to the section and select other land in lieu thereof, under sections 2275

and 2276, R. S., as amended. Under the authority of that case, the filing by the State of New Mexico in the present case of the lieu land selection constituted a waiver of the State's title to the base land, and the equitable title from that moment was in the United States. The statute explicitly provides that the filing of such a selection "shall be a waiver" of the right of the State to the base land.

We regard the case as ruled by our decision in Central P. R. Co. vs. Lane (46 App. D. C., 374), where it was held that the Interior Department was without authority to reject an indemnity selection filed by the railroad company because the land, subsequent to the filing of such selection, had been included in a water-power reserve site. In the present case, New Mexico having waived its right to the base land and filed on other land open to selection, the rights of the parties became fixed and the Interior Department was clothed with no authority to withhold its approval because of conditions which one of the parties to the contract subsequently created. It is unnecessary to repeat what was said in the Central P. R. Co. case.

The decree is affirmed, with costs.

Affirmed.

52 MONDAY, *June 2nd, A. D. 1919.*

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, Appellants, *vs.* STATE OF NEW MEXICO.	No. 3221. April term, 1919.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. JUSTICE ROBB,
June 2, 1919.

Mr. Justice Van Orsdel did not sit or take part in this decision.

53 In the Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants, *vs.* STATE OF NEW MEXICO.	No. 3221.

Petition for allowance of appeal.

Come now the appellants in the above-entitled cause, by their attorneys, and show that on or about the 2nd day of June, 1919, this court entered a decree herein in favor of the appellee and against

the appellants, affirming a decree of the Supreme Court of the District of Columbia in favor of said appellee, in which decree of said Court of Appeals certain errors were committed to the prejudice of the appellants, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellants further show that the said decree of this court is subject to review by the Supreme Court of the United States under the provisions of the first paragraph of section 250 of the Judicial Code, in that that jurisdiction of the trial court is in issue.

They further show that said decree is subject to review by the Supreme Court of the United States under the provisions of the fifth paragraph of said section 250, in that the validity of an authority exercised under the United States and the existence and scope of a power or duty of the appellants, said appellants being officers of the United States, are drawn in question.

They further show that said decree is subject to review by the Supreme Court of the United States under the provisions of the sixth paragraph of said section 250, in that the proper con-
54 struction of the acts of Congress under which appellee claims is drawn in question by the appellants, who were defendants below.

Wherefore, they pray the allowance of an appeal removing this case to the Supreme Court of the United States for the correction of errors complained of; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States; renewing herein and hereby their motion hereinbefore filed, if the same has not already been allowed, that the mandate of this court be stayed until further order.

FRANKLIN K. LANE,
Secretary of the Interior.

CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

CHARLES D. MAHAFFIE,
Solicitor.

C. EDWARD WRIGHT,
Assistant Attorney.

55 In the Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
STATE OF NEW MEXICO.
No. 3221.

Assignment of Errors.

Come now the appellants, by their attorneys, and say that in the record and proceedings of the Court of Appeals in the above-entitled

cause, and in the rendition of final decree therein, manifest error has intervened to the prejudice of said appellants, in this, to wit:

1. That the court erred in affirming the decree of the Supreme Court of the District of Columbia and in not reversing the same.

2. That the court erred in holding that the filing of a selection list by the appellee operated as a waiver of its title to the base land, as a conveyance of the equitable title therein to the United States, and as securing to said appellee a vested right or interest in and to the selected land.

3. That the court erred in not holding that until a State's selection list is approved by the Secretary of the Interior, as provided by law, no property rights in lieu lands, as against the United States, becomes vested in the State.

4. That the court erred in not holding, where land to which the State has complete legal title is offered as base because it falls within the outboundaries of a natural forest created subsequently to the State's acquirement of full legal title, and where, prior to approval by the Secretary of the Interior, the exterior lines of such natural forest are changed so that said base land is no longer within said
56 outboundaries, that the Secretary of the Interior is without authority of law to proceed to effect an exchange under the provisions of sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796).

5. That the court erred in taking jurisdiction to review directly the decision of the Secretary of the Interior in a matter committed by law exclusively to his jurisdiction and involving the exercise of his judgment and discretion, and in ordering the substitution therefor of the court's judgment and opinion.

6. That the court erred in not holding that the United States is a necessary party to this suit.

Wherefore, the appellants pray that for the errors aforesaid and other errors appearing in the record of said Court of Appeals, the said decree of said Court of Appeals may be reversed, annulled, and for naught esteemed, and that said cause be remanded to the said court with instructions to reverse the decree of the Supreme Court of the District of Columbia and to enter a decree dismissing the bill herein filed, or for such further proceedings in said suit as may be determined by the Supreme Court of the United States, to the end that justice may be done in the premises.

By their attorneys:

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.
CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

(Endorsed:) No. 3221. Franklin K. Lane, Secretary of the Interior, et al., vs. State of New Mexico. Petition for allowance of appeal and assignment of errors. Court of Appeals, District of Columbia. Filed Jun. 2, 1919. Henry W. Hodges, clerk.

57 WEDNESDAY, *June 4th, A. D., 1919.*

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
STATE OF NEW MEXICO. } No. 3221.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, it is by the court this day ordered that said petition be and the same is hereby granted.

58 UNITED STATES OF AMERICA, *ss:*

To State of New Mexico, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United State, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Constantine J. Smyth, chief justice of the Court of Appeals of the District of Columbia, this 6th day of June, in the year of our Lord one thousand nine hundred and nineteen.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged June 6, 1919.
PATRICK H. LAUGHRAM,
Counsel for Appellee.

59 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 58, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Franklin K. Lane, Secretary of the Interior,

and Clay Tallman, Commissioner of the General Land Office, Appellants, *v.* State of New Mexico, No. 3221, April term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 6th day of June, A. D. 1919.

[SEAL.]
Form C. A. S.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

60 (Indorsed on cover.) File No. 27167. District of Columbia.

Court of Appeals. Term No. 412. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, Appellants, *v.* The State of New Mexico. Filed June 11th, 1919. File No. 27167.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

FRANKLIN K. LANE, SECRETARY OF THE Interior, and Clay Tallman, Commissioner of the General Land Office, appellants,

v.

THE STATE OF NEW MEXICO.

No. 412.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

THE STATE OF WYOMING, H. S. RIDGELY and the Midwest Refining Company, appellants,

v.

THE UNITED STATES OF AMERICA.

No. 742.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the appellants in No. 412 and of the appellee in No. 742, and respectfully moves the court to advance the above-entitled cases to be heard at the next term of this court immediately following *Franklin K. Lane, Secretary of the Interior, et al.* (*John Barton*

Payne, Secretary, etc., substitute appellant) v. *Central Pacific Railway Company*, No. 34, October Term, 1919.

These two cases involve the same broad question presented in No. 34—that is, as to the rights acquired under a railroad indemnity selection or under a so-called exchange selection, made pursuant to sections 2275 and 2276, U. S. Rev. Stats., as amended by the act of February 28, 1891. (26 Stat. 796, 797, ch. 384; U. S. Comp. Stats. 1916, secs. 4860 and 4861.)

In *Lane* v. *Central Pacific Railway Company* the company's indemnity selection, based upon lands lost to it in the place limits, was rejected because, subsequently to the filing of the selection, but before its approval by the Secretary of the Interior, the land embraced therein had been withdrawn under authority of the act of June 25, 1910 (36 Stat. 847), and placed in a power site reservation.

The case of *Lane* v. *The State of New Mexico* involves a selection made under sections 2275 and 2276, R. S., by the State in exchange for certain of its lands which were within the boundaries of a national forest. Before the selection was approved by the Secretary of the Interior the base land within the national forest was eliminated therefrom, and for that reason, there being then no valid base to support the lieu or exchange selection, the Secretary refused to approve it.

Each of these cases was brought in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from enforcing the ruling

rejecting the selection and for a mandatory injunction requiring the recognition of the asserted right of the selector to the land involved by virtue of the filing of the selection.

The State of Wyoming et al. v. *The United States of America*, likewise involves an exchange selection under sections 2275 and 2276, United States Revised Statutes. There, the State selected a tract in lieu of land owned by it which was within a national forest; after selection but before approval by the Secretary of the Interior, the land was withdrawn as oil land under the act of June 25, 1910, *supra*. The State was given an opportunity to take a surface patent reserving the mineral deposits to the Government, but declined to do so, whereupon the selection was held for cancellation. As operations for the extraction of the oil contents of the land were being prosecuted by claimant under the State, the United States brought suit to quiet title, for receiver and an accounting.

In view of the fact that these cases present the same general question, it is believed that it will be advantageous to have them argued at the same time as No. 34 in their respective orders.

Appellee's counsel in No. 412 concur in this motion. Notice hereof has been served upon appellants' counsel in No. 742.

ALEX. C. KING,
Solicitor General.

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No. 728.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

v.

THE STATE OF NEW MEXICO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

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From the bill exhibited by the plaintiff, the following facts appear (R. 1–18):

By the Act of June 21, 1898, ch. 489, 30 Stat. 484, § 1, there were granted to the Territory of New Mexico, for the support of common schools, sections sixteen and thirty-six in each township, and for such sections as were mineral or had been otherwise disposed of, other non-mineral lands equivalent thereto were granted as indemnity. Such indemnity was to be selected from the unappropriated lands within the Territory by a commission of State officials, acting under the direction of the Secretary of the Interior. Section 8.

The Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, in section 6 (p. 561), granted to the proposed State of New Mexico for school purposes sections two and thirty-two in each township in addition to sections sixteen and thirty-six theretofore granted to the Territory of New Mexico, and that section contained provisions as follows:

> and where sections two, sixteen, thirty-two and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and

> seventy-six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein; * * *: *And provided further*, That the grants of sections two, sixteen thirty-two and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, * * *.

Section 11 of that Act provided that all lands granted as indemnity should be selected under the direction and subject to the approval of the Secretary of the Interior.

Sections 2275 and 2276, Revised Statutes of the United States, as amended by the Act of February 28, 1891, ch. 384, 26 Stat. 796 (U. S. Comp. Stats. 1916, Ann., §§4860 and 4861), referred to in section 6 of the Enabling Act, provide that where settlements with a view to preemption or homestead have been made prior to survey on sections sixteen or thirty-six, or where such sections are mineral or have been included within any reservation or otherwise disposed of by the United States, other lands non-mineral in character may be selected in lieu thereof.

Under the authority of these Acts, the State of New Mexico, on March 9, 1915, filed in the local land office at Roswell, New Mexico, a selection list for a certain

tract of land, assigning as base therefor a part of a certain section thirty-six, the title to which was vested in the State but which subsequently had been included within the exterior boundaries of the Sacramento National Forest (later named the Alamo National Forest). With this selection list there was tendered what is termed in the bill "a deed by quitclaim" executed by the State covering the base land (Par. XV of bill, R. 12), and which it is alleged was "a perfect deed of conveyance" to the United States of the State's interest in said base land. Par. XVI of bill, R. 13. This "quitclaim" is set forth as a part of the answer. R. 23B.

When the list was taken up for consideration by the Commissioner of the General Land Office, it was held for rejection on the ground that there was no valid base to support it, the land assigned as base having, since the filing of the application, been eliminated from the Alamo National Forest. R. 25.

From that decision the State appealed to the Secretary of the Interior, who affirmed the decision of the Commissioner. R. 26. A motion for rehearing was denied (R. 26, 27), as was a petition for the exercise of supervisory power. R. 28–34.

The answer of the defendants (R. 19–23) admitted most of the allegations of the bill but raised an issue as to the sufficiency of the alleged "quitclaim" of the base land by the State. It was asserted that the power of the Secretary of the Interior to approve a selection application such as the one tendered depended upon whether the base land was within a

national forest; that if it were not, the Secretary had no power to approve the application; that when the selection list came to the Secretary for action he found and determined that the land assigned as base had been excluded from the National Forest and that it afforded no sufficient or proper base for the selection application; that such action was taken in a matter within his jurisdiction and involved the exercise of judgment and discretion. It was further asserted that the determination of the matters of law and fact presented and the granting of the relief sought by the bill involve the title to the land in controversy, and that the United States is a necessary party to the suit.

The case was heard on the bill and answer, and a decree was entered against the defendants by the Supreme Court of the District granting substantially the relief sought by the bill. R. 43, 44. Opinion, R. 34–43.

Upon appeal, the Court of Appeals affirmed the decree. R. 48. Opinion, R. 47, 48; 258 Fed. 980. Whereupon the case was brought to this court.

ASSIGNMENT OF ERRORS.

The assignment of errors is as follows (R. 49, 50):

> 1. That the court erred in affirming the decree of the Supreme Court of the District of Columbia and in not reversing the same.
>
> 2. That the court erred in holding that the filing of a selection list by the appellee operated as a waiver of its title to the base land, as a conveyance of the equitable title therein

to the United States, and as securing to said appellee a vested right or interest in and to the selected land.

3. That the court erred in not holding that until a State's selection list is approved by the Secretary of the Interior, as provided by law, no property rights in lieu lands, as against the United States, becomes vested in the State.

4. That the court erred in not holding, where land to which the State has complete legal title is offered as base because it falls within the outboundaries of a natural [national] forest created subsequently to the State's acquirement of full legal title, and where, prior to approval by the Secretary of the Interior, the exterior lines of such natural [national] forest are changed so that said base land is no longer within said outboundaries, that the Secretary of the Interior is without authority of law to proceed to effect an exchange under the provisions of sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat. 796).

5. That the court erred in taking jurisdiction to review directly the decision of the Secretary of the Interior in a matter committed by law exclusively to his jurisdiction and involving the exercise of his judgment and discretion, and in ordering the substitution therefor of the court's judgment and opinion.

6. That the court erred in not holding that the United States is a necessary party to this suit.

Under this assignment we submit the following propositions:

1. Until approval, no title, legal or equitable, vests in the State under a lieu or exchange selection application.

2. The power of the Secretary of the Interior in passing upon such an application is not limited to a consideration of conditions existing at the time of the filing of such application but properly extends to conditions existing at the time the application is taken up for examination.

3. The United States is a necessary party to this suit since the effect of the decree below is to divest it of title to the land in controversy.

ARGUMENT.

I.

Until approval, no title, legal or equitable, vests in the State under a lieu or exchange selection application.

The case of *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, involved a lieu or exchange selection application under the so-called Forest Reserve Act of June 4, 1897, ch. 2, 30 Stat. 11, 36, sec. 1, which provided that one holding an unperfected claim, or a patent to lands in a forest reservation, might relinquish said lands and select an equal area of nonmineral lands from the vacant public domain. It will be seen that that Act was strikingly like the Act here under consideration. It was asserted in that case that upon the filing of a relinquishment of the lands claimed or owned with

an application to select other lands the selector secured an equitable title to the selected lands.

Upon this point this court said (p. 312):

> We do not see how it can be successfully maintained that, without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land.

And again, at page 313:

> Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the

> forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it.

And further, at pages 314, 315:

> What may be the decision of the Land Department upon these questions in this case, cannot be known, but until the various questions of law and fact have been determined by that department *in favor of complainant* it cannot be said that it has a complete equitable title to the land selected. [Italics ours.]

The Supreme Court of Oregon, in the case of *State* v. *Hyde*, 88 Oreg. 1, considered the question as to title acquired by selection applications under the Forest Reserve Act. It was said, speaking of the decision of this court in *Cosmos Co.* v. *Gray Eagle Oil Co.*, *supra* (pp 15, 16):

> The court in that case was concerned particularly with the question of whether an equitable title to the selected lands had passed

to the applicants. But the decision is instructive on the effect of a deed to the base lands. It is held that although the act of 1897 is a standing offer by the United States to exchange one class of lands for another, the exchange is not effected by the mere filing of the papers. In *Clearwater Timber Co.* v. *Shoshone County*, 155 Fed. 612, 620, it is held that title to the selected lands does not pass until final approval of the selection by the Commissioner of the General Land Office. If the title to the selected lands cannot vest in the applicant without acceptance of the base lands by the General Land Office, it is fairly inferable that title to the base lands cannot pass to the United States until this bureau accepts the transfer. It is said in *Pacific Live Stock Co.* v. *Isaacs*, 52 Or. 54, 64 (96 Pac. 460), that:

"Neither party acquires any legal or equitable title in the lands proposed to be exchanged until the acceptance or final consummation thereof."

The construction which we place upon the decision in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, accords with its construction by the Interior Department * * *.

It is squarely held by the federal court for this district in *United States* v. *McClure*, 174 Fed. 510, that title to the base lands does not pass to the United States until the deed is accepted by the General Land Office.

We believe the principle laid down as to the vesting of title under a railroad indemnity selection application is controlling here, for there is a strong analogy

between them. It is well settled as to railroad indemnity selection applications that no title vests until the application to select is made *and* approved by the Secretary of the Interior. *Sioux City & St. Paul R. R. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406, 408; *Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387, 391, 392.

We regard as pertinent to applications such as the one here in question what was said concerning railroad indemnity selections by this court in *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, at pp. 511, 512:

> The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for

> the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

In the case of *Buena Vista Land & Development Co.* v. *Honolulu Oil Co.*, 166 Calif. 71, the Supreme Court of California held that under a selection application by the State, made under the same statute as the one here in question, no title passes nor is any vested right acquired thereunder until the application is approved by the Secretary of the Interior. The court in deciding the case approved

and adopted the decision of the Secretary of the Interior in a contest involving the same matter.

To the same effect are *Roberts* v. *Gebhart*, 104 Calif. 67, 69, 70, 71, and the holding of the Supreme Court of Minnesota in *Baker* v. *Jamison*, 54 Minn. 17, 27, 28.

It is necessary to bear in mind that there is a clear distinction between the filing of an application to select and an approved selection. The word "selection" is often commonly used to refer to an application to select and from that arises a misapprehension as to what is meant in many of the adjudicated cases by the expression that title under such a filing vests upon selection. In such cases the word "selection" means approved selection. As was said in *Wisconsin Cent. R. R. Co.* v. *Price County*, *supra* (p. 514): "They [selections] are not considered as made *until they have been approved, as provided by statute, by the Secretary of the Interior.*" [Italics ours.]

II.

The power of the Secretary of the Interior in passing upon such an application is not limited to a consideration of conditions existing at the time of the filing of such application but properly extends to conditions existing at the time the application is taken up for examination.

It is asserted by appellee that as the State had performed all the conditions requisite in connection with its selection application, its rights thereunder must be determined as of that time, that is, the date of filing; that as the base was valid then, the sub-

sequent elimination of it from the National Forest did not invalidate it and there being no other ground of objection the application must be approved.

We recognize the well established rule that a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the Government and that his right to a legal title is to be determined as of that time. But that rule is based upon the theory that by virtue of his compliance with the requirements he has an *equitable title* to the land; that in equity it is his and the Government holds it in trust for him. *Wirth* v. *Branson*, 98 U. S. 118, 121; *Cornelius* v. *Kessel*, 128 U. S. 456, 459; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432–434.

That rule, however, cannot be made applicable to this case. The *approval*, not the *filing* of an application creates the equitable title. As the application had not been approved, no equitable title vested and the matter was therefore open for determination as of the time when presented to the Secretary and not limited to conditions existing at the date of filing.

If the Secretary's power in passing upon a selection application such as this were limited to a consideration of conditions existing at the date of *filing*, then the fact that mineral land was selected would not warrant his withholding approval, if the land were not known to be mineral at date of filing, regardless of the fact that later on and before the filing was acted upon by the Secretary the mineral

character of the land became known. This view must rest on the assumption that the equitable title vested as of the date the list was filed, but, as we have already pointed out, equitable title does not vest until approval. We have fully discussed the point, also, in the brief submitted in the case of *Payne, Secretary*, v. *Central Pacific Railway Company*, No. 17, which was argued immediately prior to this case, and we invite the court's attention to what was said there on that point (pages 9–13), particularly since the Court of Appeals in the instant case followed its decision in the *Central Pacific* case.

Now, it matters not that in this case the objection to the selection relates to the *base* and not to the *selected* land. The rule as to the scope of the Secretary's inquiry is the same in either case, and the vestiture of title as to both is necessarily concurrent.

It is sought to invoke the doctrine of relation in this case, but it is clearly inapplicable. As there was no approval there was nothing to give rise to, or to set in operation, the doctrine of relation. The legal fiction that an act performed on a certain date is deemed to have taken place on an antecedent date may not be indulged if the act is never performed.

It is in this respect that the instant case is distinguishable from *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380. In that case the indemnity selection of the railroad

company had been approved by the Secretary, and hence it was held that the title so acquired by the approval related back to the initiation of proceedings which resulted in approval, that is, back to the *filing*.

The case of *Daniels* v. *Wagner*, 237 U. S. 547, is said to be applicable and to support the State's contention. We fail to see that it has any bearing on this case. The decision in that case did not change or modify the established rule as to the power of the Land Department in approving lieu selections.

The case arose out of erroneous action by local land office officials in rejecting a lieu selection application tendered by Daniels and permitting subsequent entries to be made by others under various laws. The Land Department repeatedly instructed the local land office to allow the lieu selection application, but this was not done. When the matter was before the Secretary upon an appeal from a ruling of the Commissioner of the General Land Office that the lieu application was valid, and directing that it be allowed, the Secretary found the filing regular and that it should have been allowed; but, in view of the allowance of the subsequent entries, held (p. 556):

> It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See *Hoyt* v. *Weyerhauser et al.* (161 Fed. Rep. 324.)

All that was held in *Daniels* v. *Wagner* was that there was no discretion in the Secretary to deny a right to which one had become entitled. It will be observed that the Secretary had ruled that Daniels' application was regular and *should have been allowed.*

But there is a wide difference between the right to have a tendered filing go to record and the right to have it approved. The question in the case at bar is not whether the State's application was prior, in point of time or right, to another seeking the same land as that *selected* by the State, there has been no adjudication by the Secretary that the State should have the land selected and that the exchange should be made; in other words, no approval has been given, but on the contrary approval has been refused. Had the Secretary approved the application and after such approval had assumed the right to dispose of the selected land to another, the case would fall within the principle announced in *Weyerhaeuser* v. *Hoyt*, *supra*, and adopted in *Daniels* v. *Wagner*, that the filing which is first in time is first in right.

Referring to the *Cosmos* case, the court in its opinion in *Daniels* v. *Wagner* said (pp. 560, 561):

> In the first place, we can discover no reason for holding that the *Cosmos Case* either expressly or by any reasonable implication sustained the assumption that there existed in the Land Department in the case

of lieu land entries or any other the vast latitude of discretion involved in the proposition which was sustained. It is true in the *Cosmos Case* it was decided that courts would not interfere with the right of the Department to pass upon a question which it had the power to decide as a prerequisite to allowing a lieu entry under the Act of 1897, but that ruling has no relation to the question of the right of the Department after it had passed on the prerequisites required for the entry under the Act of 1897 and after it had decided that they had all been complied with, to deny the right of the applicant to enter and under the theory of a discretion possessed to permit a later applicant to take the land, thus depriving the first applicant of the right conferred upon him by the Act of Congress. The difference between the two is that which must obtain between the power to decide on the one hand whether the prerequisites to an entry exist and the right on the other of the Land Department after finding that an applicant has fully complied with the law and is entitled to make the entry which he asks, to permit somebody else to enter the land under the assumption that the law vests a discretion which enables that to be done.

It is true again that in the *Cosmos Case* the court declined to hold that the Department was not at liberty to determine the question as to the mineral character of the lands sought to be entered because that inquiry arose after entry and before its

> final allowance, a ruling which but in a different form illustrates the broad distinction which we have just pointed out. It is also true that *Weyerhaeuser* v. *Hoyt* concerned a question of the selection of indemnity lands by a railroad company under a railroad grant, but the reasoning in that case, we are of opinion, in the very nature of things is repugnant to the possibility of the possession of the discretionary power in the Department here asserted.

It is said, however, on behalf of the State that the relinquishment or "quitclaim" divested it of title to the base land and vested it in the United States. But the mere tendering of the deed would not be sufficient to pass the title. As was said in *Roughton* v. *Knight*, 219 U. S. 537, 547: "Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency."

It is well settled that mere delivery is not sufficient to pass title under a deed of conveyance; there must be an acceptance by the grantee. *Kochler* v. *Hughes*, 148 N. Y. 507, 514; *Meigs* v. *Dexter*, 172 Mass. 217, 218; *Moore* v. *Flynn*, 135 Ill. 74, 79, 80; *Bremmerman* v. *Jennings*, 101 Ind. 253, 256.

The Court of Appeals in this connection misread and misquoted the statute involved. Section 2275, R. S.; U. S. Comp. Stats. 1916 Ann., §4860. In its opinion (R. 48; 258 Fed. 981), the court said:

> The statute explicity provides that the *filing of such a selection* "shall be a waiver"

> of the right of the State to the base land. [Italics ours.]

The statute reads: "the *selection* * * * shall be a waiver of its right." [Italics ours.] 26 Stat. 796.

The word "selection" clearly must mean *approved selection*. As we have already pointed out (page 13), there is a distinction between an *application to select and a selection*. The word *selection* in the statute clearly means *approved selection*.

It is asserted that the State is prejudiced by the action of the Secretary because if his action is permitted to stand it will deprive the State of its rights under the land grant, will impose conditions not provided by the grant, and will impair and diminish the value of its grant. We fail to see how these results will follow. The State retains the base land which it offered and which passed to it under its grant; it therefore has sustained no loss in that respect. Moreover, in rejecting the selection here involved, the Secretary did so without prejudice to the right of the State to cure the defect in its selection by the substitution of new and acceptable base.

It is also asserted that the action of the State in filing its selection list constituted an acceptance by it of the offer of the Government to make an exchange, and that created a contract between it and the United States. If the matter be treated as a contract it must not be forgotten that the contract was entered into by

the State with full notice that before it could be fully executed there must be an acceptance and *approval* by the Secretary of the Interior. Having entered into the contract with that knowledge, the State can not complain if the approval of the Secretary was withheld on grounds within the purview of the statute.

III.

The United States is a necessary party to this suit since the effect of the decree below is to divest it of title to the land in controversy.

The decree of the District Supreme Court (R. 43, 44), which was affirmed by the Court of Appeals, permanently enjoined the Secretary of the Interior and the Commissioner of the General Land Office from enforcing their rulings and decisions adverse to the selection, and further commanded them to recognize, respect, and give full legal force and effect to the State's selection, without regard to the proclamation eliminating the base lands from the Alamo National Forest.

The effect of this decree, if sustained, would be to divest the United States of the title to land now held by it. As the United States was not a party to the suit and had not consented to be sued, the decree was erroneous since the suit was in effect one against the United States. The case, therefore, falls within the rulings of this court in *Louisiana* v. *Garfield*, 211 U. S. 70, and *New Mexico* v. *Lane*, 243 U. S. 52.

In the latter case, an original suit in this court, the bill sought an injunction against the Secretary of the

Interior restraining him from issuing a patent to one Keepers for certain lands which he had applied to purchase under the coal land laws, and to which the Secretary of the Interior had adjudged him entitled as against the State which claimed the land as inuring to it under the school-land grant.

In sustaining a motion to dismiss, one of the grounds of which was that the suit was in effect one against the United States, the court said (p. 58):

> The motion should be granted on the ground that the suit is one against the United States, under the authority of *Louisiana* v. *Garfield*, 211 U. S. 70. In that case a bill was brought in this court to establish the title of the State of Louisiana to certain swamp lands which it claimed under the statutes of the United States and to enjoin the Secretary of the Interior and other officers of the Land Department from carrying out an order making different disposition of the land.
>
> Under the statute it was contended the land vested in the State in fee simple, that is, the act was contended to have the same character and efficacy as the Act of June 21, 1898, is asserted to have in the case at bar. And certain facts were necessary to be determined as elements of decision. This court said that in the case there were questions of law and of fact upon which the United States would have to be heard. So in the present case there is a question of law whether the Act of June 21, 1898, had the quality as a grant of the land asserted of it, whether of

itself or because of its terms or their prior construction and its adoption, indeed, whether there was such a prior construction or its adoption, and again of the fact of the character of the land at the time of the grant and the evidence of it and the knowledge of it.

CONCLUSION.

It therefore follows that the decrees of the courts below were erroneous, should be reversed; and the case remanded to the Supreme Court of the District of Columbia with directions to dismiss the bill.

Respectfully submitted.

FRANK K. NEBEKER,
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HARRY L. UNDERWOOD,
Special Assistant to the Attorney General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

JOHN BARTON PAYNE, *Secretary of the Interior*, and CLAY TALLMAN, *Commissioner of the General Land Office, Appellants,*
v.
THE STATE OF NEW MEXICO.
No. 128.

Appeal From the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLEE.

STATEMENT.

The appellants' statement of the case does not mention the following facts:

I. That appellee's selection was filed and made in the local United States Land Office on March 9, 1915. (Copy of the selection is inserted between pages 22 and 23 of the Record.)

II. That notice of the selection was duly published in a newspaper from May 28, 1915, to June 25, 1915, and was otherwise given (R. 13).

III. That the papers in the selection were received in the General Land Office at Washington on April 13, 1915, and that proof of the required notice thereof to the public was received in said office on August 23, 1915 (R. 20).

IV. That the base land of the selection was eliminated from the National Forest on April 3, 1916, more than a year after the making of the selection (R. 14).

V. That the selection was rejected by the General Land Office because of the elimination of the base land from the National Forest on May 16, 1916 (R. 15).

VI. The appellants "admit that the plaintiff (appellee) has conformed to rules and regulations prescribed by the Department of the Interior in the matter of lieu selections of public lands" (R. 19).

Appellants' statement, while referring to the pertinent statutes of Congress, does not allude to the provisions of the Constitution and acts of the legislature of New Mexico which evidence that State's acceptance of the trust imposed upon it by Congress in the grant to it of public lands for common school purposes. The State's position here is that there is a compact, an agreement between the State and the United States which the defendants would impair if the State abided what it deems to be an unlawful attack upon its rights under such grant. The State contends here that the rule of decision announced by the Secretary of the Interior in his opinion of October 7, 1915, in State of California, *et al.* (44 L. D. 468), is such unlawful attack.

ARGUMENT.

I.

Wherein This Case Is Readily Distinguishable From Certain Other Cases Now Before This Court.

Lest we misstate the facts in John Barton Payne, Secretary of the Interior, Appellant *v.* The Central Pacific Ry. Co., No. 17, October Term, 1920, and State of Wy-

oming, H. S. Ridgely and The Midwest Refining Company *v.* The United States, No. 257, October Term, 1920, or express views thereon without permission from either the Court or the counsel in said causes, we shall not discuss them here. However, as the said two cases and the instant case are to be argued at about the same time, we should emphasize the following facts in the latter, to wit:

I. That the land New Mexico selected is without any value whatever for any mineral whatsoever.

II. That the land New Mexico selected was not, after selection, described in an attempted withdrawal of same by the President or anyone else for a public or other purpose.

III. That no contention is made by the appellants that the land New Mexico selected is of a class of lands excepted from the grant to it for common school purposes.

IV. That no contention is made by appellants that the land New Mexico selected is desirable for governmental or other public uses.

V. That the *sole* stated ground for the appellants' decisions against the selection made by New Mexico and for the argument by them in this Court for reversal of the concurring opinions below is that elimination from the national forest of the base land of such selection, subsequent to the making and perfecting of same, deprived the appellants of authority for approval of the selection.

II.

This Proceeding Is Not a Suit Against the United States.

It seems to be the desire of the appellants to impress this Court with the idea that this is a suit involving real property in the State of New Mexico which is claimed by

both the said State and the United States. Of course it is nothing of the sort and bears no resemblance whatever to such a suit. The *res* here is neither the base land nor the selected land in New Mexico. The *res* is the decision of the appellants against which the State has complained. The jurisdiction and power of the judiciary to inquire as to that decision with view to determining whether, if enforced against the selection described in the appellee's pleading, it would visit a wrong and injury upon the State which it is within the province of equity to prevent or avert is the heart and the entire *corpus* of this controversy.

The pleadings in the cause bring before the judiciary a school indemnity selection which the appellants admit was perfect and valid when made. The appellants assent to the proposition that the selection, when made, operated as a perfect and valid appropriation of a tract of public land, at least to the extent of segregating the land until final action on the merits of the selection. The appellants contend, however, that the selection became imperfect and invalid, and that the appropriation it had effected was vacated, when the base land was, without cause given by the State, eliminated from the national forest more than a year after the making of the selection. If that not be their precise contention, the theory of their defense must be that the elimination from the forest deprived them of authority to do aught else than to reject the selection.

This Court need but direct its attention to the prayers of the bill in order to perceive instantly the true character of this litigation. There is no prayer for a writ compelling the defendants, or either of them, to approve the lieu selection by the State. There is no prayer that the defendants, or either of them, issue to the State a muni-

ment of title to the land selected by the State. There is no prayer for a decree quieting in the State the title to the selected land. All that the State has prayed is that the judiciary compel the defendants to desist from conduct with respect to the lieu selection which, as the State alleges, constitutes an unlawful and arbitrary obstruction and barrier against the progress of its selection toward final adjudication thereof *under the acts of Congress relating to the State's grant and said Department's own rules and regulations under those acts and not under a Proclamation by the President*, dated April 3, 1916, 39 Stat., part 2, p. 1774 (*reforming the boundaries of a National Forest*), *which was issued in pursuance of authority conferred by the acts of Congress of March 3, 1891 (26 Stat. 1095), and June 4, 1897 (30 Stat. 11 at 34 and 36) which relate not at all to the grant of school lands to New Mexico.*

The prayers of the appellee's bill are, 1st, for an order restraining the appelants from enforcing with respect to the lieu selection a rule of decision announced in State of California (44 L. D. 468) which is of no conceivable present or prospective advantage or benefit to the United States or the Land Department; 2nd, for a mandatory injunction requiring the defendants to proceed to a judgment on the merits of the lieu selection, excluding from consideration such rule of decision, and 3d for general relief.

With the prayers of the bill clearly in mind it cannot but be perceived that the State seeks absolutely nothing from the United States, as a proprietor, through the medium of this suit. *The State has already, under the lieu selection, obtained from the United States, as a proprietor, all and everything it ever desired or now desires or could possibly obtain.* It is the position of the State

that the appellants have with great unwisdom, if not arbitrarily, sought to becloud what the State *has already acquired from the United States.* It was to preserve what it already possessed and not to acquire something more, that the State instituted this proceeding. The suit of the State is defensive not offensive. Its rights under its grant have been attacked by the appellants in an opinion by them to the effect that an act done by the President under statutes relating exclusively to the administration of lands within national forests, and having no actual or intended bearing on the terms and conditions of the grant to the State, has either taken from the State and destroyed all its equities under its selection or deprived the appellants of authority to approve the selection. While this is plainly a suit to restrain the appellants from an act under the color of their office for which there is no warrant of law and which, if consummated, would impair and detract from the value of the school grant to New Mexico, we nevertheless believe the instant case to be truly original.

However, there are observations in the decisions of the courts which convince us that from no viewpoint of this cause should it be said of it that it is a proceeding against the United States and, therefore, must fail because the United States has not consented to be sued.

It was well said by Mr. Chief Justice Fuller, in Stanley *v.* Schwalby, 147 U. S., 508, 518:

> "In these cases he is not sued as an officer of the Government, but as an individual, and the Court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defence *he must show that his authority was sufficient in law to protect him.*" (Italics ours.)

It is equally well settled by decisions of this Court that the officials of the Land Department are subject to the jurisdiction of the courts whenever necessary to preserve and protect the property rights of the citizen.

In the case of Cornelius *v.* Kessel (128 U. S., 456, 461), the Court thus stated the rule:

> "the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secured a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it" (p. 461).

Again, in the case of Garfield, Secretary of the Interior, *v.* Goldsby (211 ib. 249, 261, 262) the same doctrine was thus stated:

> "there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

And, finally, in the case of Ballinger, Secretary of the Interior, *v.* Frost (216 ib., 240, 249) the following was stated:

> "Whenever, in pursuance of the legislation of Con-

gress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation."

That a proceeding in equity such as appellee instituted is the appropriate remedy seems to be sustained.

"But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other." Board of Liquidation *v.* McComb, 92 U. S., 531, 541.

That an injunction is the proper remedy against an official of the United States, even though he be the head of a Department, where such officer is undertaking to act *ultra vires*, and beyond the scope of his authority, and is violating or attempting to violate the law, to the injury and damage of the complainant, is firmly established by the decision in Noble *v.* Union River Logging Company (147 U. S. 165), in which, after referring to the cases in which mandamus had been issued against the head of a Department to compel the performance of a duty purely ministerial, the Court (147 *ib.*, 171-172) said:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that

the act of the head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires* and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

III.

There Exists a Contractural Relation Between the State of New Mexico and the United States Under the School Grant.

All the pertinent and material provisions of law relating to the school grant to New Mexico will be found set out in the appellee's bill of complaint (R. 2 to 8).

By the enabling act of June 20, 1910 (36 Stat. 557, 561, 562, 563, 565, the material provisions of which are printed at pages 6 and 7 of the Record), a grant of lands for common school purposes was made to the then prospective State of New Mexico. The grant was one in trust, the terms of the trust being defined by Congress in the enabling act. The grant was accepted and the trust assumed in and by the terms of Section 2 of Article XII, Section 12 of the same Article, and Sections 9 and 10 of Article XXI of the constitution of the State. (See pages 7 and 8 of Record for print of such provisions of the State's Constitution.) The completing of the compact, the making of the grant and the acceptance of it, are evidenced by the Proclamation of the President of the United States, issued January 6, 1912 (37 Stat. 1723), wherein it is declared that "the conditions imposed by the said Act of Congress approved on the twentieth day of June, one thousand nine hundred

and ten" • • • "have been fully complied with" • • • "and the admission of the State into the Union on an equal footing with the other States is now complete."

The public lands belong to the people who have clothed Congress with the power of disposal of them. (Article 4, Section 3 of the Constitution.) In the exercise of that power Congress may grant the lands as an incentive to the material development of the country, as in the case of the grants to railway corporations, and as an inducement to the intellectual development of the people, as in the case of the grants to the States for common schools.

> "The interests of public schools have always been considered paramount to those of railroad companies in grants made to aid in their construction. The one speaks for intellectual; the other for material development." (Minnesota v. Hitchcock, 185 U. S. 373, 401.)

The grant of lands to the *Territory* of New Mexico for common school purposes is found in the Act of June 21, 1898, 30 Stat. 484.

In making such grants Congress may, and always does, prescribe in the acts of grant the conditions under which the grants shall be operative. In the case of the grant to the State of New Mexico it was provided by Congress that the State should (and the State did in and by provisions of its Constitution) accept the grant of lands for common school purposes as a donation of real estate in trust. The objects of the trust and the duties of the trustee were defined and imposed by Congress. When the trust was assumed, the State became obligated to promote its objects, chief of which was the use of moneys arising from the sale and lease of the granted lands in constructing school-houses, equipping them and obtain-

ing the force of teachers essential to the giving of instruction to the youth of the State.

But were there no obligations resting upon the United States? The consideration to the United States for the grant was of vital importance to the United States, to wit, the education of the youth of the United States resident in New Mexico. The United States might have undertaken to afford such education itself, and might have used the public lands in New Mexico to defray the expense. But the United States chose to achieve its desire and to perform its duty to the people in that regard otherwise, and accordingly contributed to the State a fund—created an endowment—out of the public lands, to be applied toward establishment of common schools. It is beside the question here whether the United States made a gift to the State which the United States could recall. The United States has never sought, or evinced a disposition, to recall the fund or endowment. On the contrary, the United States has manifested a desire that the State should be insured, as far as it was possible for Congress to insure it, against loss of any of the lands granted. This desire finds expression in the indemnity and exchange provisions of Sections 2275 and 2276 of the Revised Statutes, as amended by the Act of February 28, 1891 (26 Stat. 796) and in the salutary provisions of the Act of August 18, 1894 (28 Stat. 394).

It is alleged in appellee's bill filed herein, and the allegation is not questioned by the answer, that the State has always diligently and faithfully performed the terms of the trust under which the lands were granted to it. If the State has always done that, then it is not improbable that the State has devised a system of common schools proportioned to the fund—the endowment—Congress gave it for that purpose. If Congress foresaw (and it could not have failed to foresee) that on the credit

of such fund or endowment the State would contract and incur indebtedness toward accomplishment of the design of Congress in making the grant, then Congress foresaw the nature of the obligation it imposed on the United States in thus encouraging and requiring the State to provide facilities for the education of its people. Such obligation was that of rendering readily available by the State the fund or endowment granted to it in consideration for the establishment and maintenance of such educational facilities.

The grant and the acceptance of all its terms was a *quid pro quo. It was a contract. The only parties thereto were the United States, grantor, and the State, grantee.* Neither of the parties thereto acted or act through an agent, unless it may be said that as the grant was made by Congress it was made by the constitutional agent of the United States with respect to the public domain. *But certain is it that the Secretary of the Interior never was and is not now either a party thereto or an agent of any party thereto.* The grant was and is in its express terms complete and was and is a perfect grant by reason of the State's acceptance thereof. *There are no terms or conditions applicable to the grant which are not discoverable in the terms, or in the necessary implication of the terms, of the act making it.*

IV.

The State Complied With All Terms and Conditions of the Grant in Making Its Lieu Selection.

It is among the allegations of the bill *and the admissions in the answer* (1) that the State conformed to rules and regulations prescribed by the Department of the In-

terior in making the selection (R. 19); (2) that the State paid the fees collectible by law under the selection (R. 13); (3) that the Register and Receiver received and entertained the selection and executed a certificate thereto "that there is not of record in this office any adverse filing, entry or claim to the land selected by the State of New Mexico, and that the filing of said list is this day allowed and approved" (see copy of the selection between pp. 22 and 23 of R.); (4) that the State filed the required proof of publication and posting of notice to the public of the making of the selection (R. 13); (5) that the State filed the required proof of non-occupancy of the selected land and of non-mineral and non-saline character thereof (R. 12); (6) that the only ground ever assigned or only reason ever stated by any officer of the Land Department for rejection of the selection was that the base land supporting it was eliminated from the forest reservation before the selection received the approval of the Secretary of the Interior (R. 28 to 34).

Those allegations of the bill which are denied in and by the answer are chiefly conclusions, to wit: (1st) that the selection was accompanied by a quit claim deed from the State to the United States for the base land; (2d) that such quit claim deed constituted a perfect deed of reconveyance of the base land to the United States. As to these matters it suffices to remark that by act of the legislature of the State of New Mexico, approved June 14, 1912 (Laws of New Mexico, 1912, at page 174 et seq.), it is provided that the Commissioner of public lands of the State "shall have the power" * * * "to deed by quit claim or otherwise to the United States," etc.; and that in the making of the selection here in question the State Land Commissioner (as shown in and by

his certificate to such selection) expressly invoked and acted in pursuance of the said act of the legislature of New Mexico. Moreover, the Land Department has never at any time in its history, since January 26, 1901, date of the Opinion of Assistant Attorney-General Van Devanter (30 L. D. 438), questioned the validity and sufficiency of a State lieu selection thus executed *as the muniment of the title of the United States in and to the base land.*

The untrammeled, natural and legitimate enjoyment of the grant by the State, freed from all artificial and inartificial obstructions and impediments interposed by an officer of the United States, was as much to be desired by the United States as by the State. It requires no superior intelligence to perceive that Congress intended and expected that the State would project a system of common schools and appropriate for their construction and maintenance in reliance upon the fund or endowment created by the school grant. Who can doubt the serious disadvantage and detriment to the public interests of the State of any conduct on the part of the Secretary of the Interior that impedes the State in obtaining possession of all or any part of such fund or endowment and applying it to the uses contemplated by Congress?

V.

The School Grant Attaches to the Sections Specified Upon Identifiction Thereof by Survey and to the Indemnity and Lieu Lands Upon Identification Thereof by Selection.

It is inconceivable by us that under the facts set out in the pleadings in this cause and in the light of the law

applicable thereto this court would be disposed to distinguish the contract arising out of the acceptance of a grant of lands to a State in aid of common schools from the contract arising out of the acceptance of a grant of lands by a railway corporation in aid of transportation.

As to the time of taking of effect of the grant of indemnity lands *to a railway corporation* it was said in Ryan *v.* Central Pacific R. R. Co. (99 U. S. 382, 386):

> "Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed."

The foregoing doctrine was approved and re-affirmed in the opinion in United States *v.* Southern Pacific R. R. Co. (223 U. S. 565, 570), wherein it was said:

> "What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice."

Such doctrine with respect to railway indemnity selections was applied in Weyerhaeuser *v.* Hoyt (219 U. S. 380, 387-8), in which case the court availed of the occasion to refer to the scope of the jurisdiction and power of the Secretary of the Interior with respect to such selections in these terms:

> "The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful *at the time they were made,*" * * * (Italics by counsel.)

In the case of Daniels *v.* Wagner (237 U. S. 547, 557-558, 560, 561), the court considered and stated the effect in law of a perfect selection under the forest lieu lands act of June 4, 1897 (30 Stat. 36). In language expressive of reprobation of the extremes to which the Land Department goes, sometimes, in the exercise of what it denominates as its discretion, the court applied to the perfect forest selection the principle which is peculiar to no one class of selections but which is equally applicable to any selection which can be perfected by acts done by the selector.

An analysis of the decisions of this court in cases involving the effect of selections of indemnity lands by railway corporations shows (1st) that the court fixed upon the status of the lands at the time of selection as determining whether the railroad rights attached thereto and (2d) that the court recognized as lodged in the Secretary of the Interior the power and duty to ascertain and determine whether the selection itself was lawful at the time it was made. Nothing is found in the decisions of this court recognizing, in the slightest degree, any arbitrary or discretionary power in the Secretary of the Interior to reject an indemnity selection that was lawful at the time it was made.

The grant of Sections 2, 16, 32 and 36 in every township in New Mexico was made by Section 6 of the enabling act. (See print thereof at page 6 of Record.) That section of the statute declares that said sections of land "are hereby granted." The lieu and indemnity lands were granted to said State in and by that provision

of section 6 of the enabling act which extends the benefits of sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat. 796), to the State of New Mexico. The lieu and indemnity lands are "hereby appropriated and granted" in the express terms of those sections of the Revised Statutes. Both grants, the one of the specific sections and the one of the lieu and indemnity lands, are, we contend, grants *in praesenti*.

When Congress amended Sections 2275 and 2276, Revised Statutes, this doctrine of grants *in praesenti* had been firmly implanted in the law, and this legislative meaning of an immediate grant of the fee had been affixed to the phrase "hereby granted," so that Congress used the term advisedly, and deliberately chose to express its donation of the lieu lands and its intention regarding them in words which it knew the courts must construe to mean that the lands were thereby given, presently and absolutely. Northern Pacific R. Co. *v.* Musser-Sauntry Land Co. 168 U. S. 604, 611; Whittington *v.* Mississippi, 30 L. D. 149.

By all rule and all reason, therefore, by every canon of statutory construction, the meaning that must be attributed to amended Sections 2275 and 2276, Revised Statutes, is that it gives the lieu lands to the grantee States, directly and immediately, and as effectually as public lands are ever passed by Congressional acts of grant.

In the highest and truest sense the statute making the grant of the specific sections is in *pari materia* with the statute granting the lieu lands. State of California, 31 L. D. 335. The purpose of both grants was to give to New Mexico a quantity of land commensurate with its superficial area, and to give the 2d, 16th, 32d and 36th

sections in place as far as they will go, and then the so-called lieu and indemnity lands to fill out the grant. The latter are given in the same way, for the same purpose, and by the same terms of donation as the specified sections.

It is well established doctrine that the grant of the specific sections in place attaches and passes the title to such sections to the States at the time of survey of such sections, if they are not then subject to settlement claims, not known to be mineral in character and not within a reservation. Gaines *v.* Nicholson, 9 How. 364; Beecher *v.* Wetherby, 95 U. S. 524; Water and Mining Co. *v.* Bugbey, 96 U. S. 167; Mining Company *v.* Consolidated Mining Company, 102 U. S. 172; Hibbard *v.* Slack, 84 Fed. 574; Sherman *v.* Buick, 45 Calif. 669; Saunders *v.* Mining Co. 125 Calif. 159; Rice *v.* California, 24 L. D. 14.

We submit that the identification of indemnity lieu lands by selection is the same as identification of the specific sections by the survey. Leavenworth R. Co. *v.* United States, 92 U. S. 733, 740; Hamilton R. R. Co. *v.* Smith, 9 Wall. 99; Irving *v.* S. F. S'v'gs Union, 136 U. S. 579; Tubbs *v.* Wilhoit, 138 U. S. 134, 146; State of Louisiana, 5 L. D. 514, 517.

The method of identification is fixed by the granting act, which provides that the lieu lands "shall be selected" by the grantee State. This is more than a permission to select, it is the only method of identification provided. It is a power of identification and an investiture of agency in the State to carry out the grant by finding and pointing out the lands to come under the grant. Southern Pacific R. Co. *v.* Bell, 183 U. S. 687; Weyerhaeuser *v.* Hoyt, 219 U. S. 387.

Nothing more than identification is needed to give the

grant of indemnity and lieu lands precision and to effectuate it. We are not to forget that it is a grant in *praesenti*, and that, *ex proprio vigore*, it attaches its living title to what had already been granted. It needs only to find the description of the thing granted, to reduce a generality to exact terms. And this is exactly and fully done by the State's selection, done in the way that satisfies the Statute, and in the specific way that the Statute says it shall be done.

Rutherford *v.* Green's heirs, 2 Wheat, 194, 204;
Lessieur *v.* Price, 12 How., 76;
Fremont *v.* United States, 17 How., 559;
Dickens Lessee *v.* Mahana, 21 How., 282;
Hedrick *v.* Hughes, 15 Wall., 129;
Best *v.* Polk, 18 Wall., 118;
Beecher *v.* Wehterby, 95 U. S., 524;
Deseret Salt Co. *v.* Tarpey, 142 U. S., 248;
Curtner *v.* United States, 149 U. S., 675;
United States *v.* Loughrey, 172 U. S., 210;
United States *v.* Williams, 30 Fed., 313;
Doll *v.* Meador, 16 Cal., 320;
Bludworth *v.* Lake, 33 Cal., 261;
State *v.* Tanner, 102 N. W., 237;
Whittington *v.* Mississippi, 30 L. D., 149.

"A grant of lands to be selected becomes absolute, and the State becomes vested with the fee simple title, on its acceptance of the terms of the grant and its selection of the land." 32 Cyc. 869.

In the opinion of the Department of the Interior heretofore, if not now, the due selection of lieu lands by a State gave an absolute right to the State to the lieu lands. It was so declared in State of California (3 L. D. 327, 329), in these words:

"In other words, the State's right to indemnity for lands found by the public survey to be within any of the exceptions specified by the statute was absolute and immediate, and, when it was so discovered that the school lands or any portion thereof had been lost in place, the right to select other land in lieu thereof accrued to the State *eo instanti*. This is simply a *quid pro quo* to which she is justly and unquestionably entitled by virtue of the very terms of the statute."

"By the act of selection the title of the State became vested in the tract so selected, and all right to the basis was by said act completely divested, so that the title could not thereafter vest in the State, although the settler may have failed 'to make good his claim.'" State of California (7 L. D. 270, 272).

* * * "and having exercised this right by making selection of the land in controversy, her title to said tract was then completed, and by said act of selection she completely divested herself of all right thereafter to claim the part of section 36 used as the basis of said selection." State of California (7 L. D. 270, 272).

So completely does the selection pass the title to the base to the United States that in Rice *v.* State of California (24 L. D. 14), Secretary Francis, after finding that there was nothing in "the evidence submitted to show anything to defeat the operation of the grant" in passing title to a school section in place, ruled, notwithstanding, that as the State had applied for indemnity for the section it had thereby waived its claim and right thereto and was estopped to make the claim that it owned the land assigned as base for indemnity.

> "Conceding that the school grant attached to the specific sections after they were designated by survey, the State having selected equivalent land in lieu thereof, the government may hold the State to its waiver of the school section and dispose of it as part of the public domain." Gregg *et al. v.* State of Colorado (15 L. D. 151, 154).

In Gates *v.* Robertson (30 L. D. 83), it was held that the then Territory of Oklahoma could not, by an attempt at exercise of dominion over a school section after it had been conveyed to the United States by a selection of other lands in lieu thereof, recede from the selection.

VI.

A Perfect Lieu Selection by a State Under Its School Grant Has More Than All the Attributes of a Final Entry; It Is the State's Muniment of Title to the Selected Land and the Muniment of Title of the United States to the Base Land.

Citation of authority upon the proposition that a State selection presented in accordance with law and departmental regulations, and accepted by local officers, has the same segregative effect (*i. e.* removes the land embraced therein from the category of public lands) as a homestead or other entry is hardly necessary. We are certain that the court knows such proposition to be one uniformly maintained in and by the courts and the Land Department. But a perfect State selection does more than merely reserve the land from other appropriation. If it did only that it would be nothing more in legal effect than a homestead or desert land entry under which the

entryman had not completed compliance with all legal requirements and therefore had not submitted due proof of such compliance.

We submit that a *perfect* State lieu selection vests in the State a title which is even superior to the equitable title which passes under a final homestead or desert entry after submission of proof of compliance by the claimant with all legal requirements. We submit that a perfect State selection passes to the State the *legal title* to the selected land *and from* the State and to the United States the *legal title* to the base lands. We submit that the act making the grant coupled with such perfect selection constitute the combination of required elements which form the muniment of title in the State to the selected land and in the United States to the base land. *Of course this proposition of ours is stated only with respect to a perfect selection of lands of the class subject to selection.*

How would the United States prove its title to the base land in a selection which the Secretary of the Interior had approved, if the title thereto were questioned? Would not the United States offer as primary and best evidence of the title the documents in such selection? Such selection is the waiver, the deed, by the State to the United States. What are such documents? *They can be nothing other than the act making the grant and the selection identifying the lands to which the grant attached.* The act granting indemnity and lieu lands points out the muniment of title by providing that the State "may select," thus rendering a selection the *sina qua non* of title in the State to the lieu lands and title in the United States to the base lands. Moreover, that act expressly declares what shall be the effect in law of a selection by the State. It says that such selection shall be a waiver by the State of its right to the section in place.

A State is not helpless to prove its title to a *section in place* because it has neither a patent nor an approved selection list to which to resort for proof. *It proves its title to the section in place by proving (a) the statute that granted the section and (b) that the section was not one of those excepted from the grant.* There is absolutely no difference between the grant of the sections in place and the grant of the lieu lands, other than this—that the sections in place are specifically designated by the grantor, while the lieu lands are, in accordance with both the intention and express authorization of the grantor, specifically designated by the grantee. Until the sections in place have become known by survey, the grant is inoperative. Until the lieu lands have become known by selection, the grant is inoperative. But when survey is made, or when a selection is perfected, the grant then attaches to definite lands and the Secretary of the Interior has as little power to detach the grant when it has attached as he has to interfere with any other grant under any other law of Congress.

To assume that a State stands in need of an approved selection list to prove its title under a perfect selection of lieu land, is to assume that a Secretary of the Interior may, by some act or omission of his, effectually deprive a State of title to land it has acquired under a grant made by Congress, and deprive the United States of title to land it has acquired from a State. The States are not utterly helpless when, through an error of judgment of a Secretary of the Interior, a selection is rejected when it should have been approved. The Judicial Department of the government is *not* bound by the law as interpreted and construed by the Executive Department.

In McKenney *v.* Carson (99 Pac. 660), it was said:

"In other words, the refusal of the Secretary of

the Interior to make the approval did not necessarily affect the passing of the title, but his approval was evidence of the facts that the lands were of the character designated in the enabling act and were subject to the grant; if, therefore, the selected lands in fact were of the character granted in the enabling act that then the Secretary could not, by a mere rejection, defeat the rights of the State, since the enabling act conferred no such power upon him." (See also Brigham City *v.* Rich, 97 Pac. 220.)

• • • "the certificate of that officer, when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of their segregation." Wright *v.* Roseberry, 121 U. S. 488, 520, 521.

An approved selection list is in name, terms and effect a record of the judgment of the Secretary of the Interior that the lands described therein have passed to a State under the grant, *not under the clear list;* under the selections, *not under the approval thereof.* But it is not such judgment of the Secretary of the Interior that passes the title to the selected land. Nor *is it the decree of a court of equity sutaining a deed as a valid conveyance that passes the title. The decree simply declares that the deed passed the title.* So it is when the Secretary of the Interior approves a clear list, he simply makes a record to the effect that the selection passed the title to the base land to the United States and that the Congressional grant passed the title to the selected land to the State.

"The patent or certification by which title is transferred from the government partakes of the nature of a judgment, and, in so far as it is a judgment, it is clothed with the invulnerability and conclusiveness of a judgment." Southern Development Co. v. Endersen, 200 Fed. Rep. 272, 277.

An approved selection list always bears a certificate by an examiner in the General Land Office to the effect that the *selections* have been examined and that the lands selected "have been found to inure to the State *under its grant.*" This certificate by the examiner in the General Land Office is executed before the list is submitted to the Secretary of the Interior for that officer's action thereon. As it has been the ancient practice in the General Land Office to find that the lands "have been found to inure to the State *under its grant*" before submission of a clear list to the Secretary of the Interior for action thereon by him, *then it must be plain that the Secretary of the Interior never approves a clear list until after he has found that the grant has attached to the lands described in the clear list.* In other words, all the circumstances attending the preparation and submission of a clear list for approval by the Secretary of the Interior show, convincingly, *that it is a condition precedent to an approval that it be ascertained that the grant has already attached.* We conclude therefore that every act performed by the Land Department in the matter of selections is an act expressive of a judgment as to the effect in law of a selection at the time it is perfected by the State.

> "Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified operates upon the selection *as of the day when made* and reported to the local land office, and cuts off, as would a patent in such cases, all subsequent claimants."
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> * * * * * * *
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> "The subsequent approval of the selection by the Secretary of the Interior and the listing of the land to the State by the Commissioner of the General Land Office, completed the proceedings *which vested*

the title in the State as of the date of the selection." McCreery *v.* Haskell, 119 U. S. 327, 331.

Weyerhaeuser *v.* Hoyt, 219 U. S. 380, 388, renders unmistakable the proposition that the approval of a selection is a quasi-judicial act and when performed brings "into play the elementary principle of relation."

But it is not essential to the relief New Mexico has prayed for in this proceeding that this court agree with us that the *legal title* to the selected land is acquired by a *perfect selection thereof. By a perfect selection we mean, of course, not only one that conforms to the letter of the law and regulations, but one which was made in absolute good faith and of land of the class granted to the State.* It is sufficient for all the purposes of New Mexico in this proceeding that its equitable rights to title to land selected in good faith under a perfect selection be protected.

VII.

It is Contrary to the Meaning of the Words "Under the Direction and Subject to the Approval of the Secretary of the Interior," For That Officer to Exercise His Discretion as Distinguished From His Judgment With Respect to Selections.

The entire case of the appellants may be stated thus—That an executed exchange of lands between a State and the United States implies an offer and acceptance and that such exchange requires the act of two parties—the State and the United States *acting through the Secretary.*

We are in complete agreement with the appellants that an executed exchange implies an offer and acceptance and requires acts by two parties. The difference between

us and the appellants is as to who offers and who accepts under a State lieu selection. The appellants contend that it is the State that offers and the United States that accepts, while we contend that it is the State that accepts the offer made by the United States by and under the grant. We think that it is very plain that amended sections 2275 and 2276, Revised Statutes, expressly grant (thereby offer) to the State public lands in lieu of State owned lands in a government reservation; and that said sections expressly provide that upon acceptance of such grant (or offer) by the State under a lieu selection it thereby, as stated in those sections, waives and loses its right to the base land of the selection and also thereby causes such land to pass to the United States.

What could have been meant by Congress when it provided that lieu lands "shall be selected" by the State, if it was not meant thereby to indicate and authorize an act by the State (the act of selection) which would be both an acceptance of a particular tract of granted lieu land and an identification thereof?

The major difference between us and the appellants, however, is over their claim that in the matter of an exchange the United States acts through the Secretary. The United States acts through Congress, we think, and did so act when it made the grant of lieu lands which was very solemnly accepted by the State several years ago simultaneously with its acceptance of the grant of the specific school sections.

Section 11 of the act enabling the people of New Mexico to be admitted into the Union provides "that all lands granted in quantity or as indemnity by this act shall be selected, under the *direction* and subject to the approval of the Secretary of the Interior." (Italics ours.)

The Secretary of the Interior has formally given "*di-*

rection" as to the selection of lands by the States. His *"direction"* in that regard will be found in his rules and regulations (35 L. D. 537; 38 *ibid.* 611; 39 *ibid.* 39) governing in the matter of such selections. With such rules and regulations the State of New Mexico complied fully; and it is admitted in the answer that there was due compliance therewith. It seems to us that as the selection is admitted to have been made under such "direction" it was entitled to "approval" as a matter of right, were any approval essential (which we deny). But that is not the view of the Secretary of the Interior, who contends that (despite full compliance with his *"direction"*), he rests under no obligation to any one to give his "approval"; and that as the statute provides that the selection shall be "subject" to such approval he may reject and cancel it for matters and things not covered by the grant and not mentioned or even hinted at in the Departmental rules and regulations.

The situation would be different, we concede, if the act making the grant, or the rules and regulations that constitute the Secretary's "direction" under the grant, warned the State that it might be doing a vain and idle thing in selecting lands in lieu of those in a forest reservation because of the possibility of elimination of the base land after perfecting of the selection and before approval thereof. But the State assumed no risk in making the selection, and foresaw no contingencies with respect to the base land other than such risk and contingency as could be inferred from the terms of the act making the grant and the provisions of the Departmental rules and regulations.

Congress used the words "subject to the approval of the Secretary of the Interior" in order to safeguard the United States against possible appropriation by the State

of any lands not within the purview of the school grant; and in so doing did not impose a mandatory requirement that a selection of lands admittedly within the purview of the grant shall not be binding upon the United States until approved by the Secretary of the Interior. To rule that Congress intended that the United States should be obligated under the school grants only in the event that the Secretary of the Interior shall approve a selection under those grants would be to rule (a) that, although the grants of lieu lands were made directly to the States, the States are powerless, acting alone, to perform any act in acceptance of the grants that would in any wise obligate the United States thereunder, and (b) that there has been delegated to the Secretary of the Interior the power to contract in the name of the United States with the several States for the passing to them of the legal title to lands already granted to them as lieu lands, and that there can be no such contract until such "approval.'

The idea of the Department is that until the Secretary has approved a selection there is no meeting of minds between the United States and the State with respect to lieu lands. This idea presupposes that the Land Department is the mind of the United States so far as school grants are concerned. But this idea is based upon an entire misconception of the functions of the Secretary in connection with public lands. The mind of Congress usually thinks and determines for the United States in such matters. If it is competent for Congress to enact a statute making a grant which, upon acceptance of its stipulations and conditions by the grantee, becomes a contract between such grantee and the United States, why may it not, as it did in the case of school grants, make it in such terms as to render a sub-agent, or an

additional mind, quite as unnecessary as a fifth wheel of a wagon? The grant of school lands was accepted by the State when it entered the Union, and it was that time that there was a concourse of minds between the United States and the State. Nothing has since been enacted by Congress affecting that concourse of minds.

While the Department of the Interior has a function of mind to discharge in school grant matters it is a function limited to the duty of adjudging just what is comprised in the contract on which there was a perfect concourse of mind between the United States and the State of New Mexico several years ago.

If Congress had said "subject to the *judgment* of the Secretary of the Interior," it would have said nothing different in legal effect from what it did say. But the Secretary apparently labors under the impression that he is the agent of the United States in effectuating the grant; that Congress has clothed him with the discretion to put the grant in operation, or suspend its operation accordingly as in his discretion it is desirable to do so.

Discretion and judgment are not one and the same thing. Government by official discretion has its natural and most congenial habitat elsewhere than in America. We have endeavored in this country by constitutions, popular assemblies and statutes to keep from officers in the Executive Department of the Government the power to govern in a manner conformable only to their discretion. We prefer here government in accordance with judgment as to what is the will of the people as expressed in the enactments of Congress, or a government by law and not by men. Judgment acts in accordance with rule while discretion is its own rule.

> "Indemnity lands are selected under the direction of the Secretary of the Interior whenever the grantee

thereof complies with the directions which the Secretary has published for the regulation of such selection. The Secretary was not clothed with the power to defeat the grant of the indemnity lands, or by capricious regulation to affect the title which was intended to be conveyed." Groeck *v.* Southern Pacific R. Co., 102 Fed., 34.

Speaking of the indemnity school land grant to Nevada, which provides for selections to be "approved by the Secretary of the Interior," it was said that by this provision "no arbitrary discretion is vested in the Secretary" (Williams *v.* United States, 138 U. S. 524) and speaking again of the provision in the general lieu land act of February 26, 1859 (11 Stat. 385), requiring approval of State selections, this Court said that it is to be taken "simply as describing the general mode of procedure." (Johanson *v.* Washington, 190 U. S., 179, 183, 184.)

The exercise by the Secretary of judicial control is not confined to indemnity selections. In large measure his general powers and duties, under the whole body of land laws and in passing upon many kinds of land claims, are judicial. We think that the condition in the indemnity acts, that the selections thereunder shall be subject to the Secretary's approval, is of small import, and that without it his duties and his powers in administration of the act would be the same. He would still have to exercise the same judicial functions—find whether the facts and decide whether the law permitted the selection. He exercises the same functions, and must exercise them, in allowing or disallowing homestead or scrip entries, or deciding contested cases or refund claims. The Department is, indeed, one of the great courts of the land.

Smelting Company *v.* Kemp, 104 U. S. 640;
Noble *v.* Union River Logging Railroad, 147 U. S. 175;
Bishop of Nesqually *v.* Gibbon, 158 U. S. 166;
Brown *v.* Hitchcock, 173 U. S. 478;
Hawley *v.* Diller, 178 U. S. 488;
Cosmos Co. *v.* Gray Eagle Oil Co., 190 U. S. 309;
King *v.* Andrews, 111 Fed. 863.

The responsibility as well as the power rests with the Secretary.

Riverside Oil Co. *v.* Hitchcock, 190 U. S. 325.

"The phrase 'under the direction of the Secretary of the Interior' * * * was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain * * * the Secretary of the Interior is the supervising agent of the Government to do justice to all. * * * The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out. * * * He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands." Knight vs. Land Association, 142 U. S. 177, 178, 181.

"Neither the general jurisdiction nor the supervisory power of the Commissioner, or the Secretary, is arbitrary or unlimited. The effective exercise of each is conditioned by established rules of law. The settled rules and practice and the uniform decisions of the Department constitute both rules of law and property, and equitable titles in entrymen can not be destroyed by the Land Department in violation of them. * * * Equitable titles of claimants to lands

> under the acts of Congress may not be annulled by the Land Department in violation of its settled practice, or of a rule of law and of property established by a long line of decisions of its officers, nor without legal notice to the parties in interest and an opportunity to be heard." Howe *v.* Parker, 190 Fed. 757.

Speaking of an entry or claim to land, duly filed and before the officers of the Department, Mr. Justice Van Devanter said:

> "Whilst it undoubtedly is subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, but that they may ascertain whether or not the applicant has acquired a right to its allowance—a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises, instead of at the time of its recognition by them."

And further:

> "Land officers are powerless to adopt any regulation which is any wise inconsistent with or repugnant to the public land laws, but do possess ample power to enforce the laws." Leonard *v.* Lennox, 181 Fed. 762, 766.

> "If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Sec. 2291 requires, why not other conditions, and the disposition of the public lands thus taken from the legislative branch of the Government and given to the discretion of the Land Department. It is not an adequate answer to say that the regulation must be reasonable. The power to make it is

> expressed in general terms. If given at all it is as broad as its subject and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the Statute." United States *v.* George, 228 U. S. 21.

In short, if a State school indemnity selection is competent and perfect in all things the Secretary of the Interior exercises no function other than to find it is competent and perfect—a function to which he is rigidly confined, with few exceptions, in dealing with all public lands. When he exercises that function his approval relates back, past the act of the State in making the selection, to the date of the granting act itself, and fixes the fact that the selected land was then granted.

VIII.

Not One of the Cases Cited as Authority in the Appellants' Brief is in Point or Even of Value Suggestively.

Several opinions of this Court are cited and apparently relied on by appellants for the sustaining of the contentions they have advanced. As it is not the habit of courts, however, to adopt the views of counsel without first ascertaining through personal and independent inquiry whether warrant therefor can be found either in the written law or in judicial interpretation, we feel no uneasiness due to the adjudicated cases referred to in appellants' argument.

We have never felt that the obligation of an attorney to court and client imposed upon the attorney the duty of demonstrating the obvious. Therefore we abstain from indulging in extended comment on the cases cited

by appellants, none of which is apposite in the slightest degree, the facts in none being similar to the facts here *and none involving the question of the effect of elimination of base land from a national forest after perfection of a school grant selection of land in lieu thereof.*

It will be observed that the appellants make an effort in their brief to assimilate a forest lieu selection to a State lieu selection. The most serious criticism that can be made of such effort is to say that the Land Department has expressly held (Gideon F. McDonald, 30 L. D. 124, 125; Mary E. Coffin, 31 L. D. 175) that where a selection under the Forest Lieu Act has been perfected, although not formally approved, the subsequent elimination of the base land from the forest has no effect whatsoever upon such selection. If the Land Department had perceived the existence of any true analogy between forest lieu selections and State lieu selections that Department would doubtless have applied to the New Mexico State selection now before this court the "Rule of Reason" which it has said (in Gideon F. McDonald, *supra*), is applicable to forest lieu selections but which it here declares is inapplicable to State lieu selections.

To discuss each one of the alleged authorities cited by the appellees would seem to be unnecessary in view of the fact that Cosmos Co. *v.* Gray Eagle Co. (190 U. S. 301), is plainly the only case cited by the appellants on which they make any real reliance for reversal of the courts below.

The decision in Cosmos Company *v.* Gray Eagle Company, *supra*, rests upon something entirely different from a conclusion that the equitable title could not vest until approval of the selection. The decision rests upon the conclusion that the courts do not have concurrent jurisdiction with the Land Department over claims to the pub-

lic lands while such claims are *in fieri*, and that until the forest lieu selection had been considered and finally disposed of by that Department the courts were powerless in such a case as the Cosmos case to determine questions as to the character and extent of rights acquired under the selection. The court made it plain that to decide the questions complainant desired it to decide, notwithstanding the fact that the sufficiency of the selection was then a question before the Land Department, would be to yield to a suggestion that the courts could either anticipate the decisions of that Department in a case pending before it or preclude the Department, after it had taken up the case for action, from rendering any decision therein contrary to views on the case theretofore expressed by the courts. (For a history of after events in the Cosmos case, see Gray Eagle Oil Co. *v.* Clarke, 30 L. D. 570.)

The case at bar is wholly unlike the Cosmos case. There the Land Department had never decided whether the selection was sufficient when made. Here the Land Dpartment concedes that the selection was perfect when made. There the Land Department had rendered no final decision. Here it has rendered such decision. There it was contended that the Register and Receiver rendered the final decision when they accepted the lieu selection, although it was imperfect and incomplete at that time. Here, no such contention is made. There it was attempted to forestall an inquiry and determination by the Land Department as to the character of the selected land. Here no such attempt is being made.

But our discussion of the *Cosmos* case would be deficient in both completeness and sincerity, if we failed to notice the frequent allusions in the opinion in that case to the effect that the equitable title to land selected

under the act of 1897 does not vest until approval of the selection. Whether that doctrine is sound or not is not material here, for the reason that the act of 1897 is wholly unlike amended section 2275, Revised Statutes. That the approval gives the selector under the act of 1897 the equitable title does not mean that he had no rights under the law before he acquired such title. It was his antecedent legal right under the selection that entitled him to the approval. Congress concerns itself quite as much about such antecedent legal rights as it does about rights of the holders of the equitable title to public lands. And we may add that judged by its discussion of the said act of 1897 in Kern Oil Co. *et al. v.* Clarke (30 L. D. 550), and Gray Eagle Oil Co. *v.* Clarke (*Ibid.* 570), the Land Department appears to have accorded greater respect to the inferior right acquired by selection under said act of 1897 than it has to the superior right acquired by selection under amended section 2275, Revised Statutes. The purpose of all legislation by Congress subsequent to enactment of amended section 2275, Revised Statutes, has been to enhance the value of the school grants which are esteemed as grants for a beneficient public purpose. All legislation subsequent to the act of 1897 was restrictive of the right thereunder and that act is now repealed. Congress did not deal directly with owners of real estate within National Forests when it enacted the act of 1897. It did deal directly with the States when it made grants of lands to them. *The act of 1897 was only an offer. The act of 1891, amending section 2275 and 2276 of the Revised Statutes, was both an offer and a grant.*

There is this difference to be noticed between the approval of a selection under the act of 1897 and approval of a lieu selection by a State. The approval of the for-

mer does not pass the legal title. The approval of the latter constitutes the evidence of the legal title to the selected land, which passed to the State at time of the grant's attaching to the lands; and that time is the time of perfecting of a selection. A patent is necessary to pass the legal title under the former. A patent is not necessary to that end with respect to the latter. Approval of the former gives the selector the equitable title which is merged with the legal title when patent issues. Approval of the latter is not the merging of the selection into an approvad clear list. It is a judgment that the legal title passed theretofore. Approved clear lists almost invariably include various tracts taken from different original lists of State selections. The States have nothing to do with the actual preparation of such clear lists. They are merely a form adopted by the Land Department to promote convenience in handling State selections. Such clear lists are prepared in the General Land Office and submitted to the Secretary for his consideration and action.

Is there no legal inference to be drawn from all this? It seems to us that the legal inference is that the date of the filing of the original selection marks and fixes the time when all the equitable and legal rights of the State under a selection perfect when made attach; and that approval of a clear list is simply an adjudication accordingly. We believe that the grant of school lands was self-operative with respect to the sections in place and that it was intended by Congress to be operative with respect to lieu lands upon the performance of some act by the States and not upon performance of some act by the Secretary of the Interior. We believe that, as has been said frequently by the Land Department heretofore, that a perfect selection by a State of lieu land

transfers the school grant from the section in place to the selected lands the instant the selection of lieu lands is perfected, and that thereafter the Land Department has absolutely no jurisdiction over the selected land except such as it may exercise in determining whether the selection was perfect when made. We conclude therefore that the opinion of the court in Cosmos Company v. Gray Eagle Company, *supra*, announced a doctrine controlling in the administration of the act to which that doctrine was intended by the court to relate. But that doctrine is in no wise either controlling, or valuably suggestive, with respect to administration under a wholly dissimilar act.

IX.

Acts of the President Under Legislation Relating Exclusively to the Administration of National Forests Do Not Impair the Rights of a State Under Legislation Granting Public Lands for School Purposes.

The writer has always been of opinion that the long controversy between the States and the Land Department over the matter discussed in this brief was in very narrow compass; that the single question involved has ever been whether there is discoverable in any Act of Congress any mandate laid on the Secretary of the Interior to act as an instrument of the United States in repudiating its obligation to a State after the latter has duly perfected a selection of lieu lands under its school grant. Unquestionably there is repudiation by the United States if, after it has encouraged the perfecting of such selection, it is guilty of conduct inconsistent with its obliga-

tions under such selection; and unless there is discoverable some statute imposing upon the Secretary of the Interior the disagreeable duty of effectuating a repudiatory design of the United States, we shall continue to believe that said officer's conduct toward the selection here in question was and is wholly unwarranted.

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach the term implies, as it would be if the repudiator had been a State or a municipality or a citizen." Sinking Fund cases, 99 U. S. 700, 718, 719.

> "It derogates from the dignity and character of the Government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another." United States v. Chandler Dunbar Co. 152 Fed. Rep. 25, 41.

The advisability of making the elimination from the Alamo Forest was not a subject of conference between the United States and officers of the State of New Mexico. The interests of the State neither controlled, nor were referred to, in the making of the elimination. Nor were they affected by the elimination save to the extent that the interests of the entire country are served by the release from reservation of lands not needed for any of the purposes of a public reservation.

The decisions of the Land Department which we here complain against were, in our judgment, the offspring of confusion. The elimination of base lands from a forest

is not necessarily the release of a claim thereto by the United States. The Land Department, however, seems so to look at the matter. It seems to think that lands within National Forests which have been acquired by the United States from a State revert to the State upon their elimination from the forests. The right of the United States to a school section within a reservation attaches when a perfect selection of land in lieu of it has been made by a State; and that right of the United States is not affected because thereafter the Federal Government chose to transfer the base land from one class of land (reserved lands) to another class of lands (lands in the public domain).

In the case at bar the title to the base lands had passed to the State long before the forest was established and, therefore, the establishment of the forest had no effect thereon. If the establishment of the forest did not affect the State's title, then upon what theory can it be held that disestablishment of the forest affected an act done by the State in conveying away the title before disestablishment? If the elimination of lands from a public reservation can affect the power exercised by a State, or nullify an act done by it, in disposing of its lands, then, of course, an officer of the United States has power under the laws governing the elimination of lands from a forest reservation to vacate and cancel a State's deed of conveyance of its title to land within such reservation which was executed and delivered before the reservation was abolished.

The law relating to the control and administration of National Forests is in no measure or sense a part of the school land grant. National Forest legislation is distinctly separate and apart from and foreign to the school grant legislation. Why then allow changes in the boun-

daries of national forests to affect titles which have already vested? Boundaries of national forests are changed by act of the Executive (subject to certain statutory restrictions); but obviously executive acts can not be potent to alter or divest vested rights or titles. But that is what the decision in State of California, 44 L. D. 468, assumes to do.

Until the Department of the Interior can discover and publish something appearing in present day National Forest legislation that is expressive of the will of Congress that the elimination of a school section from a National Forest, subsequent to a perfect selection of land in lieu thereof, shall operate to invalidate such selection, or can demonstrate how the public interests of the United States are to be promoted by a ruling that because of such elimination the selection should not be approved, we will continue to believe that by the decision in 44 L. D. 468, the Department of the Interior has forced the United States into the unenviable position of a party to a valid contract who desires for no legal, equitable, moral or administrative reason to repudiate his solemn obligation thereunder.

Final analysis of the Land Department's position discloses this as the defense it is attempting here, viz, that there is a command to it issuing from Congress to reject State selections where the base lands are eliminated from the reservation subsequent to the making of the selection. The act or resolution of Congress carrying that command to the Secretary is not pointed out by that officer, who contents and defends himself by simply saying that it is his opinion that there is such a command. He attempts to state a reason for the opinion by declaring that elimination of the base land from the reservation enables the State to administer the base lands freed from any in-

convenience in the use thereof or any impairment in the value thereof caused by the reservation, and that therefore, and thereupon, the selection resting upon such base lands becomes invalid and must be rejected.

Further notice of the Land Department's stated justification of its action leads us to inquire whether there is any rule of statutory construction under which it can be seriously contended that statutes relating to the establishment and administration of forest reserves contain an implication that perfect lieu selections by a State are subject to avoidance by an act performed under the authority of those statutes. A power to avoid such a selection would be a power to work a forfeiture of a part of the grant to the State; and forfeitures by mere implication, even if an implication were discoverable in such statutes, are not favored. If an intent to avoid or forfeit a perfect selection by a State had been present in the mind of Congress when it enacted the forest reserve legislation in pursuance of which eliminations are made, such object would have been plainly and directly expressed therein.

X.

The Land Department's Ruling That the State Substitute Other and Different Base Land or Suffer Rejection of Its Perfect Selection was an Affront to the Dignity of the State and an Invasion of Its Rights Under Its Grant.

The suggestion that the State substitute other base to support the selection would be a suggestion that it acquiesce in the unlawful rejection, confess the legality, equity and justice of it and thus not only condone a seri-

ous wrong and injury, but actually encourage the infliction of the same injury in the future. It is not by compromise with the Land Department that the States must obtain the lands Congress has granted to them. It would be a compromise to follow a suggestion to substitute other base. The States have a right to demand performance by the Secretary of the Interior of his judicial duties in accordance with the mandate Congress has issued to him in the provisions of laws enacted for the benefits of the States, and that mandate requires that said officers refrain from the doing of anything so contrary to law and equity as what was done in the Land Department with respect to this appellant's perfect selection.

If the base land of the selection here under consideration became bad during the pendency of the selection, it was made bad through no act or omission of the State. If it became bad, an officer of the United States made it bad by exercise of a power delegated to him in some legislation having to do exclusively with National Forests. In other words, if the base became bad the voice of Congress, heard through and by an act thereof having nothing to do with the school grants, must have declared it bad. It could not get bad otherwise, as only Congress can authorize repudiation of the obligations of the United States. If there has been no repudiatory legislation by Congress then the selection here in question must be recognized as still valid.

Lands offered as bases for exchanges under the act of June 4, 1897 (30 Stat. 11, 34-6), do not become bad if, before approval of the offer to exchange, the base lands are eliminated from the National Forest. Of course, they do not. Common sense, to say nothing of legal right and equitable considerations, require that justice be done the citizen who selects under the act of 1897.

Do not the same things require that the same justice be done the States?

> "At the time of the filing of said selection and prior thereto the tracts embraced in the said deed of relinquishment and reconveyance, and in lieu of which the selection is made, were within the limits of the Olympic forest reserve in said State. Subsequently, on April 7, 1900, by proclamation of the President, that part of the forest reserve within which the said tracts are situated was restored to the public domain. No action has as yet been taken upon said selection."
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> * * * * * *
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> "By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of July 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired." Gideon F. McDonald, 30 L. D. 124, 125. See also Mary E. Coffin, 31 L. D. 175.

Lands claimed by settlers before survey in the field do not become bad bases for State selections if, before approval of the selections resting thereon, the settlers' entries are canceled or the settlements are abandond. Of course, they do not. No act of a settler can affect the rights of a State under its school grant after the right accrues and is exercised by and under a perfect selec-

tion. To hold otherwise would be to hold the States at the mercy of the will of individuals. Even the officer who rendered the decision of the Land Department in State of California, 44 L. D. 468, was of opinion at one time, that a base which is good when a selection is perfected can not be made bad thereafter by some act which was not performed by a State or the United States. He so declared on July 3, 1913, in Las Cruces, 05781, when he affirmed that it was in accordance with "the uniform rule of administration" that a good base could not be made a bad base by the act of an individual. That officer had probably forgotten the principle of this "uniform rule of administration" when he rendered his decision in 44 L. D. 468. The rule and the principle underlying it were stated in State of California (7 L. D. 270) to be as follows:

> "*By the act of selection the title of the State became vested in the tract so selected*, and all right to the basis was by said act completely divested, so that the title could not thereafter vest in the State, although the settler may have failed 'to make good his claim.'" (Italics are ours.)
>
> "But by the existence of a settlement on said tract at the date of survey, the State acquired the right to select other land in lieu of it, and having exercised this right by making selection of the land in controversy, *her title to said tract was then completed*, and by said act of selection she completely divested herself of all right thereafter to claim the part of section thirty-six used as the basis of said selection, whether McEvoy made good his claim or not." (Italics are ours.)

In Thomas F. Talbot (8 L. D. 495) it was said that the ruling in State of California (7 L. D. 270) was this—

> "that by the act of selection of lieu land the title of the State became vested in the tract so selected, and all right to the basis was by said act completely divested so that the title could not thereafter vest in the State although the settler may have failed to make good his claim." (See also State of South Dakota *v.* Thomas, 35 L. D. 171, 173.)

The State could not substitute new base with any assurance that the new base would bring to the State title to the selected land. It did not know when it prepared, filed and perfected the selection now under consideration, that the base it offered would be eliminated from the reservation before approval of the selection. New base, if now within a reservation, might also be eliminated therefrom before approval. Who now knows that it would not be? If the Department of the Interior could assure the State that new base, now within a reservation, would not be eliminated therefrom on the recommendation of the Department of Agriculture, or some other department, bureau or office of the government, before approval of the thus reformed selection, there would then be an inducement to furnish new base. But how could the State be assured against a possible continuous performance? If the Department of the Interior can give assurance that a new base will not be thrown off its base, it has the power to give that assurance before or at the time of the offering of the first base. The Land Department, however, has no authority for the giving of such assurances and should not, therefore, suggest to the State a course in the taking of which the State could not be fully protected by that Department. The States need no protection by one department against the acts of another. Congress has given the guaranty of the United States to the States that they will be treated honorably by

the United States. The nation gave that guaranty when it made the school grants. But the States will stand in sore need of re-affirmation of that guaranty by the enactment of further legislation, if there continues that uncertainty, instability and chaos with respect to selections which the Department of the Interior has produced by the decision in State of California (44 L. D. 468).

In a California State selection, known as Sacramento 02549, the original base was eliminated from the forest after perfection of the selection; and at the suggestion of the Land Department the State thereafter substituted other base in the forest. Before the substituted base reached the Secretary for his considration it was eliminated from the forest, whereupon the State was required to and it did make a second substitution of base. This illustrates the hide and seek, kaleidoscopic effect of the treatment accorded by the Land Department to such selections.

Unless there is a recall of the decision of the Land Department in appellee's case, or a reiteration by Congress that the school grants bind the honor and conscience of the nation, the States will suffer more in the future from that decision than they have in the past, as it is a certainty that the proverbial Anglo-Saxon attitude towards lands will bring about, and at no far distant date, more proclamations of exclusions from, than inclusions in, National Forests.

But it should not be presumed by the Department of the Interior that there is a plethora of school sections within reservations, either claimed by settlers or mineral in character from which a new base for the selection here in question could be supplied without detriment to the interests of the State. The contrary of that is the natural presumption, viz., that the States have not neglected tak-

ing the benefits of the school grant by stupidly failing to realize fully and promptly under the grant by immediately taking lieu lands for sections which they either can not wholly control or use advantageously. And even if there could easily be found within the State a school section in place owned by it (or one which will be owned by it on disestablishment of the reservation within which it is now included) and less valuable for school purposes than the section offered as base in support of the selection we are considering, should that suffice to warrant the Department of the Interior in formulating such a doctrine as is declared in 44 L. D. 468, or excuse or justify the State of New Mexico in submitting, without protest, to an assault upon its school grant which, if not resisted and overcome, will not only render the grant lacking in the elements of definiteness and certainty which Congress embodied therein with respect to exchanges but leave a sovereign State, when in the Department of the Interior, without the slightest protection from those principles of law and equity which may be invoked in any other tribunal in the country by the humblest citizen or foreigner who is a party to a contract arising out of an offer and acceptance.

XI.

It Would Be To Penalize the States for Delays In the Transaction of Public Business By the Land Department To Hold That the Elimination From the Forest Defeated the Selection.

The State's selection was filed with the Register and Receiver on March 9, 1915. On August 23, 1915, the General Land Office at Washington received proof of full

compliance with all statutory and Departmental requirements. If the selection had been acted on by the General Land Office on the latter date said office would have necessarily reported same to the Secretary for his approval. But it was not acted on then nor for nearly a year thereafter. The Land Department transacts an immense volume of business under the public land laws and does not find it possible at all times to transact such business with promptitude, *i. e.*, within a few weeks or few months subsequent to the claimant's becoming entitled to action by that Department on their perfected applications, filings, entries, locations, selections, etc. The delay is not due to lack of efficiency on the part of employees in the ancient system for administering the public lands. Congress has not always afforded the means for adequate clerical assistance. But the many ways the said Department is handicapped in administering justice under the law expeditiously and otherwise desirably need not be stated. The material fact here is that, as shown by the record, the particular perfect selection with which we deal here, to wit, the selection of the W½ of Section 29, Tp. 23 South, Range 38 East in lieu of the N½ of Section 36, Tp. 19 S., R. 14 E. was not acted on by any officer of the Land Department in Washington until May 16, 1916, when the appellant-Commissioner attempted rejection and cancellation thereof because, as he stated, the base land was eliminated from the forest reservation on April 3, 1916, more than a year after the making of the selection.

Do the States engage in a game of chance when they make lieu selections? Do they wager that they will get the selected land before the United States concludes to eliminate the base land from the reservation? Do they assume the risk of getting something which the United

States has promised before the latter changes its mind?

Because other public business having precedence over the perfect selection was not disposed of and gotten out of the way until after the section in place had been eliminated from the Forest Reserve, the Department of the Interior says that such selection must be rejected because the United States can plead thereto *non damnificatus*. An attempt by a party to a contract to justify his breach thereof upon the specious ground that the happening of events subsequent to his becoming obligated (which events may reasonably be supposed to have been in his contemplation at the time of entering into the contract) can not meet the approval of any court.

That a State selection can not be reached for adjudication in the regular course of the business before the Land Department until several months after it has been perfected was well known to the Land Department when the selection in question was made. It was also well known to the State; but the law imposes no such condition precedent to the validity of a State selection as that the State shall obtain an approval thereof before the base land is eliminated from the public reservation. Or, stated otherwise, the law imposes no such condition as that a State's right to lieu lands shall be determined with reference to conditions existing with respect to the base at time of submission of the selection to the Secretary of the Interior for action thereon by him. Not only are the terms and conditions of the contract between the United States and the States, under the School grants, to be ascertained with reference to the provisions of the laws making those grants, but the fairness of such contract, as in all contracts, is to be judged as of the date of the contract. Even at this time there exists no fact that would render approval of the selection unfair to the

United States in any respect. Notwithstanding this, the Land Department says, in effect, that the enjoyment by a State of a grant of lands made to it by Congress shall not be permitted to begin at the time the lands granted are pointed out, specified, designated and identified in the only manner prescribed by Congress to render the grant operative and effective, viz., by a selection of such lands, but that enjoyment of the grant shall be indefinitely postponed by conditions existing in the Land Department with respect to other and unrelated matters that render it impossible for that Department to reach and adjudicate the selection for a year, two years, three years, four years, or five years, or any number of years, after it has been made.

* * * "When the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 431-2.

XII.

INEQUITABLE AND WHOLLY UNWARRANTED IN LAW WAS THE ACT OF THE APPELLANTS IN ATTEMPTING REJECTION AND CANCELLATION OF THE PERFECT SELECTION.

The tribunal in which the perfect selection made by New Mexico was rejected, did not decree its rejection upon terms of equity. It apparently accorded no con-

sideration whatever to the moneys expended and the time and effort given by the State in making the selection. It ordered rejection because, in its opinion, the United States had, by eliminating the base from the Alama Forest, expressed and effectuated a purpose of receding absolutely from the contract which arose when the selection was perfected. The hardship visited upon the State by the rejection was deemed neither entitled to consideration nor worthy of notice by the Land Department, notwithstanding said Department's power and duty to observe and apply the principles of equity in all public land matters. We can not bring ourselves to believe that the United States ever desires to do a wrong to any State or person that has, in good faith, fully complied with all the conditions of a law providing for the acquisition of title to the public lands; and we do not believe that there is anything in any law that permits officials of the Land Department to take such action as would effect repudiation of a governmental obligation.

If it be doubted that a serious wrong and injury are done to the States by the rule of decision in 44 L. D. 468, which the Land Department enforced against this appellee, the skeptic should trouble himself to learn what the various States have found it necessary to do in the matter of selections which have been rejected in accordance with that harsh and unnecessary rule. In honorable observance of obligation to persons who have contracted with the States for an interest in the selected lands, adjustments are being made to save such persons harmless by either refunding the initial payments they made to the States or, when possible, by substituting new bases if adverse claims have not intervened to place the selected lands forever beyond the reach of the States and such persons. The State of California (and

there may be other States) has been forced, as a consequence of that rule of decision, to enact remedial legislation on behalf of such persons. And all this wrong and injury results from a mistaken view of the meaning of the lieu provisions of the school grants that places the United States in an untenable position.

The Land Department's view of the situation presented by the elimination of base land from a national forest before approval of a due selection of land in lieu thereof, is this: That the exchange should not be consummated because the reason therefor has ceased to exist from the standpoint of but one of the parties. But that Department will concede that the exchange with which we are dealing here would and should have been consummated if taken up for action by the Secretary at any time within several months after the selection was made; and that the reason for the exchange continud to exist for a year after the selection was perfected. It must concede also, but it has given little or no consideration to the fact, that all the expenditures of money, time and effort made by the State in perfecting its selection must count for naught if the selection is not approved.

Let us inquire whether this view of justice taken by the Executive Department of the Government harmonizes with the view of justice taken by the Legislative and Judicial Departments in matters with which those latter Departments deal. It has never been the tendency of Congress when repealing a statute relating to the public lands, or to any other matter, to destroy all rights that accrued under conditions existing before the repeal, simply because the repeal caused the conditions to cease to exist thereafter. It has never been a tendency of the Judiciary when considering cases arising out of contract

between a grantor and grantee, to destroy all the rights of the grantee upon proof that while the reason for the grant existed when it was accepted by the grantee it ceased to exist thereafter owing to no act or omission on the part of the grantee. In both the Legislative and Judicial Departments of the government the marked tendency is to preserve and safeguard both citizens and the States against the effect of any changes in matters of government that are within the province of the Legislative and Judicial Departments. Those two Departments deem it promotive of justice in matters within their jurisdiction to determine the rights and obligations of citizens and States in the light of the circumstances and the law obtaining when the transactions creating the rights and obligations were entered into and made. Those two Departments believe that a contract arising out of acceptance of an offer should be enforced under the facts and law obtaining at the time of the acceptance. Those two Departments believe that a consideration for a contract or grant which is existing and valid when the contract or grant is made, and which was then taken and received by the grantor, can not be rendered invalid and non-existent by subsequent acts of the grantor for which the grantee is in nowise responsible.

But the Executive Department of the Government, represented by the Department of the Interior, has proclaimed that it is justice in the matter of school lieu selections to enforce this sort of doctrine, to wit: That while Congress both furnished a reason for an exchange and gave a right to the States to make an exchange, it was intended by Congress that the reason should be regarded as never having been furnished, and that the right should be regarded as never having been given if, after the reason has influenced the States to exercise the right to

select lieu lands, the condition that gave rise both to the reason and the right thereafter ceases to exist by some act of the United States. Doe has said to Roe that as the latter's lands are surrounded by lands owned by the former, the latter may convey his lands to the former and receive in consideration therefor an equal area of other lands belonging to the former. Roe accepts that proposition and executes, records and delivers to Doe a perfect deed of conveyance of title; and enters into contractual obligations with respect to the land Doe has engaged to transfer. Roe has also borne the expense of citing, by publication, all persons desiring to object to the contract to come in and be heard. Doe's lawyers are busy men and find it impracticable to examine Roe's deed, although it has been before them for a year or so. Before it has been examined, Doe informs his lawyers that he has made such a readjustment of his holdings that Roe's lands are no longer surrounded by lands owned by Doe and that, possibly, the land Roe has transferred is less valuable than the land Doe has contracted to give in consideration therefor. The lawyers, as the more zealous than conscientious servants of Doe, thereupon tell Roe that the reason for the exchange has ceased to exist and that Doe will not consummate it; and that he will not even as much as reimburse Roe to the extent of his expenses in the transaction. If Roe has the spirit of a beggar he will submit to the injustice.

If the condition that both gives rise to the reason for an exchange and confers a right to have it made, must exist at time of approval of a clear list *as an indispensable condition precedent to its approval,* then it devolves upon the Land Department to prove the statute having to do with National Forests that contains provisions expressive of an intention entertained by Congress that an

act performed thereunder shall (a) invalidate acts done by a State under its school grant; shall (b) detach the grant from lands after it has attached thereto; shall (c) divest the United States of the title to base land acquired under a selection valid and perfect when made; shall (d) revest the title to such base land in the State, and (e) make the United States play the role of Doe and the State the role of Roe in the illustration of unconscionable conduct given hereinbefore.

Conclusion.

We cannot close without calling attention to the tremendous power exercised by executive tribunals. Such power, so exercised, and not always divorced from executive considerations, should be confined within the narrowest limits, and all encroachments on the constitutional rights of the citizen or a State should be jealously restrained by the Courts.

As said by Mr. Justice Bradley:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*" Boyd *v.* United States, 116 U. S., 616, 635.

> "The securities of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachment of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the 'cobweb chains of paper constitutions.'" Judge Cooley, in Story on the Constitution, fifth ed., sec. 1938.

The ruling of the Land Department with respect to New Mexico's perfect lieu selection is wholly unwarranted by any law, unsupported by any judicial decision, contrary to equity, unconscionable and without even the mitigating circumstance of being conducive to Departmental convenience in the administration of the public land laws.

It is submitted that the concurring opinions below express the only possible conclusion of the judiciary consistent with justice under the law in the United States and should, therefore, be sustained and affirmed.

Respectfully,

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SUPREME COURT OF THE UNITED STATES.

No. 128.—October Term, 1920.

John Barton Payne, Secretary of the Interior, et al., Appellants, *vs.* The State of New Mexico. } Appeal from the Court of Appeals of the District of Columbia.

[March 7, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit by the State of New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling or annulling a lieu land selection of that State under a mistaken conception of their power and duty. A hearing on the bill and answer resulted in a decree for the State, which the Court of Appeals affirmed, 258 Fed. 980, and the defendants appealed to this court.

There was no controversy or difference in the land department about any question of fact, but only in respect of the time as of which the officers were authorized and required to determine the validity of the selection.

Congress granted to New Mexico for the support of common schools designated sections of land in each township, subject to specified exceptions, with a provision enabling and entitling the State to select other lands in lieu of those excepted, and with a further provision whereby, in the event any of the designated sections after passing under the grant should be included within a public reservation, the State was to be entitled to waive its right to them and select instead other land of equal acreage. See *California* v. *Deseret Water, etc. Co.*, 243 U. S. 415. All lieu lands were to be selected "under the direction and subject to the approval of the Secretary of the Interior." Acts of June 21, 1898, c. 489, §§ 1, 8, 30 Stat. 484; March 16, 1908, c. 88, 35 Stat. 44; June 20, 1910, c. 310, §§ 6, 10-12, 36 Stat. 557; February 28, 1891, c. 384, 26 Stat. 796, amending §§ 2275, 2276 Rev. Stat.

Some of the tracts in place after passing under the grant were included within a public reservation called the Alamo National Forest. Afterwards, on March 9, 1915, the State filed in the local land office a selection list waving its right to one of these tracts and selecting in its stead other land of like area lawfully subject to selection. The list conformed to the directions given by the Secretary of the Interior and was accompanied by the requisite proofs and the proper fees. Notice of the selection was duly posted and published, proof of publication was submitted and the publisher's charge was paid. In other words, the waiver and selection were regularly presented and all was done by the State that needed to be done by it to perfect the selection. The notice did not bring forth any protest or objection, and in due course the local land officers forwarded the list and supporting proofs and papers to the General Land Office with a certificate stating that there was no adverse filing, entry or claim to the land selected and that the list had been accepted and approved by them. The list remained pending in that office until May 16, 1916, when the Commissioner directed that the selection be canceled solely on the ground that in the meantime, on April 3, 1916, the base tract—the one the right to which was waived—had been eliminated from the reservation by a change in its boundaries. The State appealed to the Secretary of the Interior and he affirmed the Commissioner's action. Both officers proceeded on the theory that the validity of the selection was to be tested by the conditions existing when they came to examine it and not by those existing when the State made it—in other words, they conceived that although the selection was lawful when made they could and should disapprove it and direct its cancelation by reason of the elimination of the base tract from the reservation a year later.

The courts below rejected that view and held that those officers were required to give effect to the conditions existing when the selection was made and that, if it was valid then, they were not at liberty to disapprove or cancel it by reason of the subsequent change in the status of the base tract. In our opinion the courts were right. The provision under which the selection was made was one inviting and proposing an exchange of lands. By it Congress said in substance to the State: If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral

public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard. In this respect the provision under which the State proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

In the brief for the officers it is frankly and rightly conceded to be well settled that "a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the Government and that his right to a legal title is to be determined as of that time"; and also that this rule "is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; that in equity it is his and the Government holds it in trust for him." See *Lytle* v. *Arkansas*, 9 How. 314, 333; *Stark* v. *Starrs*, 6 Wall. 402, 417-418; *Ard* v. *Brandon*, 156 U. S. 537, 543; *Payne* v. *Central Pacific Ry. Co.*, *ante*, p.—. But it is said that as the selection is "subject to the approval of the Secretary of the Interior" no right can become vested, nor equitable title be acquired, thereunder unless and until his approval is had, and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected, and of approving or rejecting the selection accordingly. The power conferred is "judicial in its nature" and not only involves the authority but implies the duty "to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections." *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 388; *Daniels* v. *Wagner*, 237 U. S. 547, 557, *et seq.*; *Payne* v. *Central Pacific Ry. Co.*, *supra*. This view of it has been enforced where the Secretary, misconceiving his authority and the rights of the selector, erroneously declined to approve and canceled selections lawfully made. *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720; *Daniels* v. *Wagner*, *supra*. And it should be observed that this view has been recognized and applied by the land department, although not with uniformity. In the case of *Gideon F. McDonald*, 30 L. D. 124, which involved a lieu land

selection and a state of facts much like those now before us, it was said by the Secretary of the Interior: "When the selection was filed the land embraced in the accompanying deed of relinquishment and reconveyance was within the limits of the forest reserve and a proper basis for a selection under said act, and the land selected by McDonald in exchange was, according to the records of your [Commissioner's] office, of the character subject to such selection and free from other claim or appropriation. By this deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired. Your [Commissioner's] office will therefore carefully examine the papers and records pertaining to this selection and, if it is found to be otherwise free from objection, the fact of the elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made, after full compliance by the claimant with the lieu land act and regulations, will not prevent approval of the selection."

In *California* v. *Deseret Water, etc. Co., supra*, which involved a like waiver and selection alleged to have been lawfully made and to be awaiting action by the Secretary, the United States, in a brief presented by leave of the court, took the position that by the waiver the base tract was taken without the condemnation law of the State. The state court had held the waiver and selection of no effect and this court reversed that decision.

We conclude that an injunction was rightly awarded, but that it will be better suited to the occasion if it be confined to directing a disposal of the selection in regular course unaffected by the elimination of the base tract from the reservation. With this modification the decree is

Affirmed.